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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~693~~. 252.

THE STATE OF MONTANA *EX REL.* CHARLES S. HAIRE, PLAINTIFF IN ERROR,

vs.

JAMES H. RICE, AS STATE TREASURER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED APRIL 16, 1906.

(20,195.)

(20,195.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1906.

1 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Petition.

Your petitioner, Charles S. Haire, respectfully represents and shows unto this Honorable Court:

I.

That respondent is and has been since the first Monday in January, 1905, the duly elected, qualified and acting treasurer of the State of Montana.

II.

That the state board of land commissioners of the State of Montana, pursuant to the authority conferred by and the directions contained in an act of the legislative assembly of Montana entitled "An Act to enable the Normal School land grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College," approved February 2, 1905, issued coupon bonds to the amount of seventy-five thousand dollars, dated May 1, 1905, of the denomination of one thousand dollars each, maturing twenty years from date, payable at the option of the State ten years from date, bearing interest at the rate of four per cent. per annum, payable semi-annually on the first days of May and November
2 in each year at the office of the respondent herein, signed by the state board of land commissioners and countersigned by the secretary of state, with his seal attached thereto. Each of said bonds is payable to bearer and contains the condition required by Section 2 of said act approved February 2, 1905. A copy of one of said bonds is hereto attached, marked "Exhibit A," and made a part hereof.

III.

That said bonds, and all thereof, were duly and regularly offered for sale, and the state board of land commissioners submitted a bid for said bonds, at par, as an investment for the permanent common school fund, which bid was accepted, and said bonds were thereupon delivered to, and are now in, the possession of, and held by, said respondent, pursuant to such sale.

IV.

That at the time of said sale there was, ever since has been and is now to the credit of the permanent school fund, for investment purposes, an amount of money largely in excess of the purchase price of said bonds.

V.

That your petitioner, within the past six months, performed services in connection with the erection of an addition to the present state normal school building at Dillon, Montana, in the capacity of an architect and as superintendent of the construction of said addition, of the reasonable value of twelve hundred dollars.

VI.

That the claim of your petitioner for such amount as the value of such services was presented to the executive board of the
3 state normal school, and by the said board approved, and was also approved and ordered paid by the state board of examiners, whereupon a warrant was issued to your petitioner by the state auditor of Montana in the words and figures following:

"STATE OF MONTANA:

No. 2617.

HELENA, MONTANA. *Oct.* 6, 1905.

State Warrant. $1200.00.

The Treasurer will pay to C. S. Haire or order Twelve Hundred Dollars for services as architect out of any moneys in the treasury in the Normal School Bond Fund.

H. R. CUNNINGHAM,
State Auditor.
C. D. FRENCH, *Dep-ty.*"

VII.

That your petitioner presented said warrant to the respondent herein for payment, and payment thereof was refused.

VIII.

That there are no funds available for the payment of said warrant except the proceeds from the sale of said bonds.

IX.

That the respondent refused, and still refuses, to pay said warrant, for the reason, as given by him, that he has been advised by the attorney-general of the State of Montana that the bonds so issued as aforesaid are illegal because (1) the proceeds derived from the sale of the lands granted to the State of Montana for the different educational institutions by Section 17 of an act of Congress entitled "An Act to provide *the* the division of Dakota into two states and
4 to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the

original states, and to make donations of public lands to such states," approved February 22, 1889, can not lawfully be used, and the interest and income thereof can not be used for any purpose except the support and maintenance of such educational institutions; (2) because the issuance of said bonds created an indebtedness against the State of Montana in excess of one hundred thousand dollars; and (3) because the law authorizing the issuance of said bonds is in violation of the constitution of the State of Montana.

X.

That patents have been issued by the United States government for a large part of said lands granted to the State of Montana by said act of Congress.

XI.

That this application is made to this court for the reason that it involves a matter of grave public interest, in that if said bonds are declared illegal the decision of this court will, not only affect said bonds, but also affect other bonds amounting to several hundred thousand dollars, which have been prior to January 1st, 1905, issued and sold upon the faith and credit of the proceeds derived and to be derived from the sale of the lands granted by Section 17 of said act of Congress for the different educational institutions therein mentioned.

XII.

That your petitioner has no plain, speedy or adequate remedy in the ordinary course of the law.

5 Wherefore, your petitioner prays that an alternative writ of mandate issue out of this court directed to said respondent, as state treasurer of the State of Montana, requiring him to pay said warrant out of the fund created by the purchase of said bonds, or show cause before this Honorable Court, at a time to be named, why he has not done so.

CARPENTER, DAY & CARPENTER,
W. T. PIGOTT AND
M. S. GUNN, *Attorneys for Relator.*

STATE OF MONTANA, *County of Lewis and Clark, ss:*

Charles S. Haire, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the statements therein contained are each and all true.

CHARLES S. HAIRE.

Subscribed and sworn to before me this 1st day of December, 1905.

[NOTARIAL SEAL.] T. A. MAPES.
Notary Public in and for Lewis and Clark County, Montana.

6 EXHIBIT A.

UNITED STATES OF AMERICA.

State Board of Land Commissioners.

No. —. $1000.

State Normal School Four Per Cent. Bond of 1905.

Know all men by these presents: That the State Board of Land Commissioners of the State of Montana is justly indebted for the money borrowed, and, for value received, does hereby promise to pay to the bearer, on the first day of May, 1925, or on the first day of May, 1915, at the option of said Board, the principal sum of one thousand dollars ($1,000) with interest thereon at the rate of four per cent. per annum, payable semi-annually, on the first day of November and the first day of May of each year, as evidenced by, and upon the presentation and surrender of the annexed interest coupons as they shall severally become due; both such principal and interest payable in lawful money of the United States of America, at the office of the State Treasurer of the State of Montana, in the City of Helena.

This bond is one of a series of seventy-five bonds of the denomination of One Thousand Dollars, each of like tenor and date, and numbered from one to seventy-five, inclusive, and aggregating the sum of Seventy-five Thousand Dollars ($75,000). The right is hereby reserved to redeem this bond at any regular interest period, as stated herein, on or after three years from the date hereof, upon the payment of the principal and interest in full to the date of redemption, and a premium upon the face value of the bond of five per cent.; provided that not less than sixty days' notice shall be given by the State Treasurer of such intention to redeem by pub-
7 lication in not less than one newspaper published in the City of New York, and one newspaper published in the City of Helena, Montana; and, provided further, that such redemption shall be made by serial number beginning with the bond bearing the last number then outstanding.

This bond, as well as the others of this series above described, is issued for the purpose of providing funds to erect, furnish and equip an addition to the present State Normal School Building, at Dillon, Montana, pursuant to and in full compliance with the provisions of an act of the legislative assembly of the State of Montana, entitled: "An Act to Enable the Normal School land grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College," approved February 2, 1905, by which said act all funds realized from the sale or the leasing of the lands, and licenses to cut trees thereon, said lands comprising one hundred thousand acres, granted by the United States to the State of Montana for the establishment and maintenance of a state normal school, under and by virtue of the provisions of Section 17 of the Act of Congress approved February 22, 1889, entitled: "An

Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form State Governments and to be admitted to the union on an equal footing with the original states, and to make donations of public lands to such states," are authorized to be pledged, and are in pursuance thereof hereby pledged as security for the payment of the principal and interest of this bond and all others of this series, except such sums as may be necessary for the payment of the bonds heretofore issued against such funds, and the interest thereon.

8 It is hereby recited and certified that this bond is issued in strict compliance with and conformity to the provisions of the above mentioned Act of the Legislative Assembly of the State of Montana, authorizing this bond issue, and the constitution and laws of the State of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the State Board of Land Commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon, as herein and in said act provided.

In witness whereof, the State Board of Land Commissioners have signed this bond and caused the same to be countersigned by the Secretary of State of the State of Montana, who has attached the Great Seal of the State hereto, and the interest coupons hereto attached to be signed with the lithographic signature of said Secretary of State; all as of date this first day of May, 1905.

J. K. TOOLE, *Governor,*
W. E. HARMON,
Superintendent of Public Instruction,
A. N. YODER,
Secretary of State,
ALBERT J. GALEN,
Attorney General,
State Board of Land Commissioners.

Countersigned:
A. N. YODER,
Secretary of State.

9 Endorsed: Filed Dec. 1st, 1905. John A. Athey, Clerk.

Minutes of the Court, December 1st, 1905.

Order Directing Issuance of Alternative Writ.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

The relator's petition for writ of mandate herein, was this day presented to the court, and thereupon, after consideration, it is by the court, ordered that an alternative writ of mandate issue, returnable on Saturday, December 9th, A. D. 1905.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Alternative Writ of Mandate.

The State of Montana to James H. Rice, Treasurer of said State Greeting:

Whereas, it appears from the petition of Charles S. Haire, relator in the above entitled cause, that the state board of land commissioners of the State of Montana, pursuant to an act of the legislative assembly of Montana entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal college," approved February 2, 1905, issued coupon bonds to the amount of seventy-five thousand dollars; that said bonds were offered for sale and sold to the State of Montana, the said state purchasing the same as an investment of the permanent school fund; that at the time of said sale and ever since there has been to the credit of the permanent school fund an amount of money largely in excess of the purchase price of said bonds; that relator performed services in the capacity of an architect and as superintendent of construction of an addition to the state normal school at Dillon, of the reasonable value of twelve hundred dollars; that the claim of relator for such services was presented to and approved by the executive board of the state normal school and was also approved and ordered paid by the state board of examiners, whereupon a warrant was issued by the state auditor directing the treasurer to pay to relator the said sum of twelve hundred dollars out of any moneys in the treasury in "the normal school bond fund;" that there are no funds available for the payment of said warrant except the proceeds from the sale of said bonds; that relator presented said warrant for payment, and payment thereof was refused. It further appearing that relator has no plain, speedy or adequate remedy in the ordinary course of the law, and that it is a proper case for the issuance of a writ of mandate from this court:

Wherefore, we do command you that immediately after the receipt of this writ you pay said warrant out of the funds created by the sale of said bonds, or that you show cause before this court on the 9th day of December, 1905, at the opening of court on that day, why you have not done so.

Witness the Honorable Theodore Brantly, Chief Justice of said Court, at Helena, Montana, and the seal of said Court this 1st day of December, 1905.

[COURT SEAL.] JOHN T. ATHEY, *Clerk.*

Let the above writ issue.

____ ____,
Chief Justice.

Service hereof is hereby accepted for and on behalf of Respondent this 1st day of December, 1905.

ALBERT J. GALEN,
Att'y General.

Endorsed: Filed Dec. 1, 1905. John T. Athey, Clerk.

12 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Demurrer.

Now comes the Respondent in the above entitled proceeding and demurs to the petition for Alternative Writ of Mandate herein filed, for that:

I.

Said petition does not state facts sufficient to constitute a cause of action, or to entitle the relator to the relief demanded, or any relief, at the hands of this Court.

ALBERT J. GALEN,
Attorney General,
W. H. POORMAN,
Assistant Attorney General
E. M. HALL,
Assistant Attorney General,
Attorneys for Respondent.

Service of a copy hereof is hereby admitted this 8th day of December, 1905.

M. S. GUNN,
W. T. PIGOTT,
CARPENTER, DAY & CARPENTER.

13 Endorsed: Filed Dec. 9, 1905. John T. Athey, Clerk.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Motion to Quash.

Now comes the respondent in the above entitled proceeding and moves this honorable court to quash, vacate, and set aside, the Alternative Writ of Mandate heretofore and on December 1st, 1905 issued out of said court in said proceeding, for that:

I.

Said petition upon which said Writ was issued does not state facts sufficient to constitute a cause of action, or to entitle Relator to the relief demanded, or any relief, at the hands of this Court.

II.

Said petition shows on its face that the Act of the Legislature mentioned therein, pursuant to which the bonds mentioned in the said petition were issued, is in violation of the provisions of the Act of Congress, approved February 22nd, 1889, known as "The
14 Enabling Act" of Montana, and of the provisions of the Constitution of Montana.

III.

Because said petition shows on its face that the issue of bonds mentioned therein created an indebtedness against the State of Montana in excess of One Hundred Thousand Dollars, without the law authorizing the issue of such bonds having been first submitted to and approved by the people at a general election in the manner provided in the Constitution of the State.

ALBERT J. GALEN,
Attorney General,
W. H. POORMAN,
Assistant Attorney General,
E. M. HALL,
Assistant Attorney General,
Attorneys for Respondent.

Service of a copy hereof is hereby admitted this 8th day of December, 1905.

M. S. GUNN,
W. T. PIGOTT,
CARPENTER, DAY & CARPENTER.

Endorsed: Filed Dec. 9th, 1905. John T. Athey, Clerk.

15 *Minutes of the Court, January 9th,* 1906.

Order Amending Title of Cause and Adjudging that Alternative Writ be Quashed and Proceedings Dismissed.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

This cause this day came on for the judgment and decision of the Court. It is ordered, that the words "as State Treasurer," follow the name of James H. Rice, in the title, making the same read: James H. Rice, as State Treasurer, Respondent, and that the same

correction be made in all records and papers pertaining to said cause.

Whereupon, on consideration, it is now here ordered and adjudged by this Court, that the Alternative Writ of Mandamus be quashed and these proceedings are dismissed at the cost of the relator. Opinion by Mr. J. Holloway, Mr. Chief Justice Brantly concurring; Mr. J. Milburn concurring specially.

16 No. 2258.

STATE OF MONTANA:

In the Supreme Court, December Term, 1905.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

Submitted December 9, 1905; decided January 9, 1906.

Filed January 9, 1906. John T. Athey, Clerk.

Mr. Justice HOLLOWAY delivered the opinion of the Court:

The Ninth Legislative Assembly of Montana passed an Act entitled "An Act to enable the Normal School Land Grant to be further utilized in providing Additional Buildings and Equipment for the Montana State Normal College," approved February 2, 1905. This Act authorizes the state board of land commissioners to issue bonds, sell the same, and apply the proceeds to the erection,
17 furnishing and equipment of an addition to the present state normal school building at Dillon. It is provided that the funds realized from the sale or leasing of the lands granted by the United States to Montana for state normal school purposes (100,000 acres), and the licenses receiver from permits to cut timber on any of said lands, are pledged as security for the payment of the principal and interest on such bonds, except such sums as may be necessary to pay other bonds heretofore issued. There is the further provision that the State of Montana shall not be liable for the payment of the bonds or the interest.

Pursuant to the provisions of this Act the state board of land commissioners issued coupon bonds to the amount of $75,000, dated May 1, 1905, in denominations of $1,000 each, bearing interest at four per cent. per annum, payable semi-annually, and caused the same to be executed as prescribed by such Act. Thereafter such bonds were duly advertised for sale by the state treasurer, and the state board of land commissioners submitted a bid for said bonds at par as an investment for the permanent common school fund, which bid was accepted and, presumably, the money for the bonds paid over to the credit of the building fund of the Normal School, although this does not appear affirmatively from the petition filed herein.

This relator, having performed services in connection with the

erection of the addition to the State Normal School building, presented a claim for $1,200 to the executive board of the State Normal School, which was allowed and approved by that board, and allowed and ordered paid by the state board of examiners, a warrant issued for the same by the state auditor, and this warrant*ed* presented by the relator to the state treasurer who refused to pay it.
18 Thereupon this proceeding in *mandamus* was commenced to compel the state treasurer to pay said warrant. An alternative writ and an order to show cause issued, and upon the return the state treasurer, represented by the attorney general, moved to quash the alternative writ and dismiss the proceedings upon the ground that the petition for the writ does not state facts sufficient to entitle the relator to any relief.

The contention of the respondent is, that the Act of the Legislative Assembly above referred to is unconstitutional, first, because the Act authorizes the expenditure of funds received from the sale of the Normal School lands for the payment of these bonds; second, because the issuance of said bonds increases the indebtedness against the state of Montana to an amount in excess of $100,000; and, third, because the Act authorizes the expenditure of the money for the erection of a building for the State Normal School.

By the provisions of Section 17 of the Act of Congress, approved February 22, 1889 (25 Stat. at Large, 676), commonly known as the Enabling Act, there was granted to the State of Montana "For State Normal Schools" 100,000 acres of the public land. Other grants were made for the School of Mines, the Agricultural College, the State Reform School, the Deaf and Dumb Asylum, and the State Capital Buildings; and by other sections of the same Act a grant of 72 sections of the public land was made for a University, and grants, additional to those mentioned in Section 17, for the State Capital Buildings and Agricultural College. Other like grants of land were made by the same Act to the states of North Dakota, South Dakota and Washington, and of the grants made by Section 17 it is said:
"And the lands granted by this section shall be held, appro-
19 priated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

Section 5 of the Act of February 2, 1905, provides, that the state treasurer shall keep all moneys derived from the sale, leases, or sale of timber from lands granted in aid of the State Normal School, in a separate fund to be known as "The State Normal School Fund," and out of this fund he shall pay the interest on these bonds as it accrues, and the principal at maturity.

Section 12 of Article XI of the Constitution of Montana provides: "The funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be de-

voted to the maintenance and perpetuation of these respective institutions."

Beyond question the State Normal School is one of the institutions of learning to which reference is here made, and as it "is the only one with which we are directly concerned in this proceeding, we may paraphrase section 12 above, as follows: The funds of the State Normal School, from whatever source secured, shall be invested as prescribed by law, and the interest from such invested funds, together with the rents from leased lands belonging to the Normal School grant, shall be devoted to the maintenance of such Normal School.

The provisions of this section of the Constitution are
20 mandatory and prohibitory. (Section 27, Article III.) *The funds* referred to mean *all* funds. They shall be invested *to draw interest* and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant which have not been sold,—and not the principal sum derived from the sale of such lands or from the sale of timber,—shall be used for the maintenance and perpetuation of the Normal School, and for no other purpose.

If, then, the principal sum received from the sale of lands belonging to the Normal School grant must be invested to draw interest, that principal sum cannot be used to pay off the principal of or interest on the bonds authorized by the Act of February 2, 1905, as provided by such Act. The legislature might have provided by that Act that the money received from the sale of Normal School lands and timber from lands belonging to that grant should be invested, and that the interest from such investment and the rental from leased lands belonging to the Normal School grant should be set apart to pay the interest on these bonds and discharge the bonds themselves at maturity, and had it done so, it would have been carrying out the intent and purpose of the Enabling Act and the provisions of the Constitution.

It is apparent from the most casual reading of section 12 of Article XI of the Constitution, and section 5 of the Act of February 2, 1905, above, that as soon as the treasurer receives any moneys from the sale of Normal School lands or timber therefrom into "The State Normal School Fund," such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the
21 rents from leased lands, can be devoted to the maintenance and perpetuation of the Normal School. If this section of the Constitution is to be given force and effect, it is apparent that the Act in diverting the moneys received from the sale of Normal School lands, or the sale of timber therefrom, to the payment of these bonds is in direct violation of the provisions of this section of the Constitution.

But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act, the lands granted to the state for Normal School purposes are to be held, appropriated and disposed of for Normal School purposes in such manner as the legislature

of Montana may provide, and that this Act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of Article XI of the Constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect. It is perfectly apparent, then, that in order to hold the Act of the legislature approved February 2, 1905, binding and the bonds issued in pursuance thereof valid, this court must hold section 12 of Article XI of the Constitution inoperative and of no effect. However, as the Constitution of Montana is the supreme law of this State, aside from the provisions of the Constitution of the United States and the treaties made and statutes enacted in pursuance thereof, it becomes incumbent upon this court to reconcile, if possible, the provisions of our Constitution with the Enabling Act under which the Constitution was adopted and the state admitted into the Union, for, however reluctant a court is to declare unconstitutional and invalid an Act of a legislative
22 assembly, it will with even greater hesitation hold inoperative and invalid a provision of a state Constitution.

It is to be observed that the lands granted to the state by the Enabling Act are granted for specific purposes which are clearly defined: 100,000 acres are granted for State Normal Schools, and the only limitation upon the grant is, that such lands shall be held, appropriated and disposed of exclusively for the purposes mentioned, in such manner as the legislature may provide. Under section 17 above, the legislature might designate the agent to select and classify the lands. It might specify that the lands should be sold at private sale or at public auction. It might specify the quantity of land to be sold at any one time, or the amount to be sold to any one individual. It might provide the terms upon which the land should be sold, and the price to be received for it. It might make suitable provision for renting the land, and fix the amount to be let to any one person and the price at which it should be let; and, finally, it might make provision for the sale of growing trees upon the lands selected under the terms of this grant. All of these provisions in section 17 were met by legislative enactment comprised in Title VIII, Part III, of the Political Code.

The question now arises: Does section 12 of Article XI of the Constitution contravene the provisions of section 17 of the Enabling Act? Is there any conflict between the provisions of the Enabling Act, which grants to the state legislature authority to prescribe the manner in which these Normal School lands shall be held, appropriated and disposed of—and the provisions of section 12 of Article XI of the Constitution, which provides that the funds of the State Normal School shall be invested and only the interest
23 from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the State Normal School? We are of the opinion that there is no conflict whatever. Under the provisions of section 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not

control the funds derived from sales or leases except in conformity with the constitutional provisions of section 12 of Article XI above.

The lands were granted to the state of Montana—not to the Legislative Assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for Normal School purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its Legislative Assembly. Therefore, when the Constitution says that all moneys coming into the State Normal School fund, from whatever source, shall be invested and only the interest and rental from leased lands shall be used for Normal School purposes, the legislature may prescribe the manner in which the funds shall be loaned, but it can not say that they shall go into any other channel. The absence of any constitutional provision respecting the grant for Capital Building purposes, and the grant of the Penitentiary at Deer Lodge city and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed.

In the very highest sense the purpose of the grant in aid of the State Normal School is observed and carried into effect by section 12 of Article XI of the Constitution. In the wisdom of the framers of that instrument, provision is made for the support of our State Normal school for all time. The principal sums derived from the sales of the lands or of the timber are made to serve this institution by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate. That this is what is meant by section 17 of the Enabling Act and section 12 of Article XI of the Constitution seems to- clear for argument. This construction is merely giving meaning to the plain and explicit language of these sections, does no violence whatever to the terms of either, and permits each to remain in full force and effect—a result which the court is compelled to reach, if possible, and one which can not be avoided without reading into the terms of the Enabling Act language which is not to be found there.

A great deal of consideration was given by counsel to the question whether or not the language of section 11 of the Enabling Act modifies the language of section 17; and while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case.

Neither are we disposed to enter into a discussion now as to whether the bonds authorized by the Act increases the State debt.

So far as the other question is concerned it need only be noticed in passing. The United States granted 100,000 acres of land

to Montana "for State Normal Schools." The Congress was only concerned in seeing that this grant was applied to the purpose for which made. It was apparent that in order to be available, the lands must be utilized, and the Congress therefore left it to the legislature of this state to designate the manner in which such lands should be held, appropriated or disposed of; but it went no further than this. It did not attempt to say when the Normal School should be instituted; how many Normal Schools should be established; or how the funds derived from the sale of leasing of these lands should be controlled or made to work out most effectually the end sought by the grant.

The constitutional convention adopted Ordinance No. 1, whereby the grant of these lands was accepted upon the terms and conditions provided in the Act; and as an extra precaution and as an additional safeguard, section 12 of Article XI of the Constitution was adopted, making the grant in fact an endowment, and only the interest and rental immediately available for the use of the school and such interest and rental may be used for any legitimate purpose connected with the maintenance or perpetuation of the school.

But it is said that other like bond issues have been made against these various land grants, and that for a number of years the legislative and executive branches of this state government have given to section 17 of the Enabling Act the construction for which contention is now made by this relator, and that such construction ought
26 to be given great weight by this court. But, as said before, such construction has the effect of nullifying a section of our State Constitution, and this court ought to be slow indeed to declare such a result, no matter if the legislative and executive branches of the state government may have done so. Furthermore, the rule that contemporaneous construction by the department specially delegated to carry into effect a particular provision of law shall raise a strong presumption that such construction rightly interprets the provision, only becomes effective when there is a reasonable doubt as to the meaning of the provision. Such construction can never abrogate the text or fritter away its obvious sense. And acquiescence for no length of time in a construction by the coordinate branches of government which has the effect of nullifying a provision of the Constitution, will justify a court in adopting such construction unless it is the only reasonable one. (Cooley on Constitutional Limitations, 7th ed., 104–106.) Furthermore, such construction to be available as an argument, must have been uniform, and such is not the fact with reference to the subject now under consideration.

The Enabling Act was passed February 22, 1889, and it is not contended that any attempt was ever made by the legislative or executive departments of the state government to give to section 17 the construction now claimed for it by the relator, prior to March 6, 1895, when the first of these bond issues was authorized (Secs. 1630–1637, Political Code); so that the construction thereafter given by the legislature was not in fact contemporaneous with the passage of the Act. But, on the other hand, the constitutional convention met in July, 1889, and adopted section 12 of Article XI as the ex-

pression of its interpretation of section 17 of the Enabling
27 Act, and the Second Legislative Assembly passed an Act entitled "An Act to Provide for the Selection, Location, Appraisal, Sale and Leasing of State Lands," approved March 6, 1891 (Laws of 1891, page 174*a*), by the terms of which it is specifically provided that all moneys derived from the sale of these lands shall be invested, and only the interest of such invested funds and rental from leased lands shall be used for the purpose for which the grant was made. These provisions were re-enacted in an Act of the Third Legislative Assembly, approved March 9, 1893 (Session Laws, 1893, page 49), and again re-enacted in a Code provision (Sec. 3509, Political Code), approved February 25, 1895.

Thus, within five months after the Enabling Act was passed, we have a construction of section 17 of it, by the constitutional convention, directly opposed to the view now urged by relator; and we further have apparently the same construction placed upon it, or at least an attempt to carry into effect the idea of the framers of the Constitution, by every session of the legislature, barring the first, which did not accomplish anything in the way of legislation,—from the time of the passage of the Enabling Act to March 6, 1895; and it does not affect the result to say that the various institutions had not been established prior to 1893. So that the construction given to section 17 of the Enabling Act by the Montana legislature has not been uniform, even if the terms of that section were of doubtful meaning, which does not appear to be the fact.

We do not think that the construction given to that section since 1895 had been done under such circumstances, or that the result to be anticipated from a different construction now by the courts is of such character as to render applicable here the maxim
28 *"Communis error facit jus."*

It would seem that the Congress meant that the state of Montana should in the first instance build the necessary buildings for a State Normal School out of its own proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter; and that this was the construction given to section 17 of the Enabling Act by our Legislative Assembly is demonstrated by the action taken by it at the time these several state institutions were established. The Third Legislative Assembly provided for the establishment and location of the Agricultural College, the University, the Normal School and School of Mines, and made an appropriation for each of these institutions. That for the State Normal School is similar to the others and provides for an appropriation of $15,000, and respecting this appropriation the Act says: "The money hereby appropriated, shall be expended under the direction of the State Board of Education, in the manner and under such restrictions as may be provided by law, and for the purpose of establishing said State Normal School, by commencing the construction of suitable buildings for maintenance of said State Normal School." It was clearly the understanding of the Legislative Assembly at that time that the state itself must erect the buildings, and it provided for the commencement of such work

evidently with the idea that future legislatures would make other appropriations to complete the work then initiated.

A cardinal principle of statutory construction is, that the court shall, if possible, ascertain the legislative intent. The Enabling Act must be considered as a whole, and some idea of the
29 intention of Congress respecting the grants mentioned in section 17 may be gathered from the other sections of the Act. Generally speaking, the Act treats of grants for the support of Common Schools in sections 10 and 11; for the University in section 14; for the Agricultural College in section 16; and for these other institutions in section 17. With respect to the grant for the support of the Common Schools it is said, that the lands shall be sold and "the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools." With respect to the grant for the support of a University it is said, that these lands shall be sold "and the proceeds shall constitute a permanent fund to be safely invested, * * * and the interest thereof be used exclusively for university purposes." With respect to the grant for the support of an Agricultural College it is provided that the state shall accept the grant with the limitations imposed by the Act of Congress of July 2, 1862 (12 Stat. at Large, 503); and that Act provides that these lands shall be sold and all moneys derived from such sale "shall be invested * * * ; and that the money so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, * * * and the interest of which shall be inviolably appropriated, * * * to the endowment, support and maintenance of" such college.

If the government has a policy respecting these grants for educational purposes, these provisions would indicate that such policy contemplates that the respective grants shall operate as endowments, and that policy is clearly carried into effect by the provisions of section 12 of Article XI of the Constitution.

30 While we do not agree with the reasoning of the supreme courts of Washington and North Dakota respecting the meaning of section 11 of the Enabling Act, it is interesting to note that they have held legislation of the character of the Act of February 2, 1905, invalid, and bond issues similar to that authorized by our legislature, void, and that, too, under the same Enabling Act and somewhat similar constitutional provisions. (State *ex rel.* Heuston *v.* Maynard, 31 Wash. 132, 71 Pac. 775; State *ex rel.* Board *v.* McMillan, (N. D.), 96 N. W. 310.)

The Act of the legislature now under consideration in authorizing the expenditure of moneys received from the sale of Normal School lands, or the timber on lands granted in aid of the State Normal School, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI, of the state Constitution, and is therefore void and of no effect; and, being so, the state treasurer rightly refused to proceed under it and can not be coerced by *mandamus*.

The alternative writ of mandamus is quashed and these proceedings are dismissed.

Dismissed.

WM. L. HOLLOWAY,
Associate Justice.

I concur:
THEODORE BRANTLY,
Chief Justice.

Mr. Justice MILBURN: I concur in the opinion. I think it is well, however, inasmuch as a great deal is said in the opinion, and very properly, in regard to contemporaneous construction, that the
31 statements made in the body of the bonds themselves in respect of the validity thereof, should appear. Section 3470 of the Political Code declares that the governor, the superintendent of public instruction, the secretary of state, and the attorney general shall constitute the state board of land commissioners. As appears from an inspection of the bonds, these officers signed each of said bonds. In each bond appears the following statement: "It is hereby recited and certified that this bond is issued in strict compliance with and conformity to * * * the constitution and laws of the state of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the state board of land commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon as herein and in said Act provided." As shown in the opinion, the bonds are not in compliance with the Constitution. I think it proper that this construction of the law by the several executive officers of the state who signed the bonds, given at the time of the issuance of the bonds, should appear as part of the history of the case.

That part of section 17 of the Enabling Act saying that "the lands granted * * * shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned, in such manner as the legislatures of the respective states may severally provide," means in my opinion, in a few words, this: that the legislature may say *how*
the lands may be sold, but does not mean that they shall say
32 what shall be done with the proceeds. The Constitution, in my opinion, is controlling in the matter, and is not in violation of any of the provisions of the Enabling Act.

GEO. R. MILBURN,
Associate Justice.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

Petition for Rehearing.

The relator in the above entitled cause respectfully petitions this Honorable Court for a rehearing upon the grounds and for the reasons following:

1. Because the opinion is inconsistent and contradictory.

2. Because the court does not give any force or effect to the requirement of Sec. 17 of the Enabling Act that the lands granted for a state normal school shall be *appropriated* for the purpose for which the grant is made, and in other respects misconstrues said Sec. 17.

3. Because the court misconstrues Sec. 12 of Art. XI of the
33 Constitution of Montana.

I.

In the opinion it is said, with reference to the Act of the Legislative Assembly of Montana, approved February 2, 1905:

"The legislature might have provided by that act that the money received from the sale of normal school lands and timber from the lands belonging to that grant should be invested, and that the interest from such investment and the rental from leased lands belonging to the normal school grant should be set apart to pay the interest on these bonds and discharge the bonds themselves at maturity, and had it done so, it would have been carrying out the intent, and the purpose of the Enabling Act and the provisions of the Constitution."

The Act of the Legislative Assembly of Montana, approved February 2, 1905, is entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal college."

In Sec. 7 of the Act it is provided that "the moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the present state normal school building, at Dillon, Montana."

In the opinion it is also said:

"It would seem that the congress meant that the State of Montana should in the first instance build the necessary buildings for a state normal school out of its proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter."

If the meaning or intent of congress is as expressed in the last quotation made, then by what course of reasoning or construc-
34 tion of the Enabling Act can it be said that if the Act of the Legislative Assembly of Montana, approved February 2, 1905, had provided that the proceeds from the sale of the lands should be invested, "and the interest from such investment and the rental from

leased lands belonging to the normal school grant should be set apart to pay the interest on these bonds and discharge the bonds themselves at maturity, * * * it would have been carrying out the intent and purpose of the Enabling Act," when the act of the Legislative Assembly of Montana provided that the money realized from the sale of the bonds should be used "to erect, furnish and equip an addition to the present state normal school building?"

In the opinion it is said:

"The absence of any constitutional provision respecting the grant for capital building purposes, and the grant to the penitentiary at Deer Lodge city and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed."

As we construe the language of this court just quoted, it is held thereby that, except for the provision of Sec. 12 of Art. XI of the Constitution, the legislature might provide for the use of the proceeds derived from the sale of the lands the same as has been done with reference to the proceeds of the lands granted for public buildings at the capital of the state.

In the opinion it is further said, with reference to the proceeds of the lands granted for a state normal school:

"The principal sums derived from the sales of the lands or timber are made to serve this institution by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate. That this is what is meant by Sec. 17 of the Enabling Act and Sec. 12 of Art. XI of the Constitution seems too clear for argument."

If Sec. 17 of the Enabling Act so clearly means and intends that the proceeds derived from the sale of these lands should constitute a principal sum which should be kept inviolate and that only the interest to be derived from the investment of such sum should be used, then by what course of reasoning or by what rule of construction can it be said that, except for the provisions of Sec. 12 of Art. XI of the Constitution, the legislature would have the right to make such disposition of these grants as has been made of the grants for a penitentiary and for public buildings at the capital?

We submit that in the opinion of this court it is clearly stated: (1) That it was the intention of congress, expressed in the Enabling Act, that the lands granted for a state normal school should constitute an endowment for the maintenance and perpetuation of such school, and that the buildings necessary for such a school should be furnished by the state; (2) that if the legislature had provided in the Act of February 2, 1905, for the application of interest derived from the investment of the proceeds of the lands sold and the rent received for the lands not sold to the payment of the principal and interest of the bonds issued to obtain money with which to erect an addition to the state normal school building at Dillon, such provision would have been valid; (3) that by Sec. 17 of the Enabling Act congress meant and intended that the proceeds derived from the sale of the lands granted to the state normal school should constitute a fund which should remain inviolate, and that only the in-

terest derived from the investment of such fund should be used
36 to maintain and perpetuate such institution; and (4) that except for the provisions of Sec. 12 of Art. XI of the Constitution, the legislature would be free to make such disposition of the grant for a state normal school as it should see fit. In other words, it might provide for the use of the proceeds as it has done in the case of the grant of land for public buildings at the capital of the state.

We believe that in view of these inconsistencies and contradictions we are justified in asking this court to review the opinion which it has rendered.

II.

Section 17 of the Enabling Act contains the following grant of lands to the State of Montana "for the establishment and maintenance of a school or mines, 100,000 acres; for state normal schools, 100,000 acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, 50,000 acres; for the establishment of a state reform school, 50,000 acres; for the establishment of a deaf and dumb asylum, 50,000 acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, 150,000 acres."

The section further provides that "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

The provision that the lands granted by the section shall be held, appropriated and disposed of exclusively for the purposes therein mentioned is not limited to the grant for a state normal
37 school, or to the grants made for the other educational institutions, but applies generally to all lands granted by the section.

If, then, it was the intention of congress that the grant to the state normal school "should constitute an endowment for the maintenance and perpetuation of such school," as stated by the court in its opinion, it certainly follows that the grant for public buildings at the capital of the state should constitute an endowment for the maintenance and perpetuation of such buildings. The only expense of maintaining and perpetuating a capital building is the expense of a janitor, an engineer and the cost of repairs. Can it be that congress had such items of expense in mind in making this grant of 150,000 acres, or did congress intend that the proceeds of the lands should be used to erect the building? Sec. 12 of the Enabling Act contains a grant to each of the states of fifty sections of land "for the purpose of erecting public buildings at the capitals of the states, for legislative, executive and judicial purposes." The grant contained in Sec. 17 for public buildings at the capital of the state is declared to be "in addition to the grant hereinbefore made for that purpose." The purpose of the grant contained in Sec. 12 is to erect buildings, and it necessarily follows that the purpose referred to in Sec. 17 is the same purpose. When, therefore, we consider

the grant for the erection of public buildings at the capital, it is impossible to find the intent that the lands granted should constitute an endowment for the maintenance and perpetuation of such buildings.

Whatever the intent of congress may have been with reference to the use of the proceeds of the lands granted for the erection of buildings at the capital, the same intent existed in making
38 the grant for normal schools. This must be so, or the language used in expressing the intention has one meaning as applied to the grant for a normal school, and another meaning as applied to the grant for buildings at the capital. Sec. 17, when construed solely with reference to the grant of lands for public buildings at the capital should read as follows: There is granted to the state of Montana for "public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acress," and the lands so granted "shall be held, appropriated and disposed of exclusively" for the purpose of public buildings at the capital of the state. When the section is considered solely with reference to the grant for a school of mines it would read: There is granted to the State of Montana "for the establishment and maintenance of a school of mines, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for the purpose of the establishment and maintenance of a school of mines. When all of the grants made by the section, except the grant for state normal schools, are eliminated, it would read: There is granted to the State of Montana "for state normal schools, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for the purpose of state normal schools.

It would seem to be too clear for argument that, if it was intended that the lands granted for a state normal school should be sold, the proceeds invested and the interest from such investment only should be used for the purpose of the grant, it was also intended that the lands granted for the erection of public build-
39 ings at the capital of the state should be sold, the proceeds invested and the interest only should be available for the erection of such buildings. On the other hand, if it was intended that the proceeds derived from the sale of lands granted for public buildings at the capital of the state should be used for the erection of such buildings, it was also intended that the proceeds derived from the sale of lands granted for the state normal school should be used for the purpose for which such grant was made. Let us assume for a moment that it was the intention of congress that the lands granted for public buildings at the capital should be sold, the proceeds invested and the interest only used for the erection of such buildings. Contemplate for a moment, if you will, the construction of the capital building of this state under such circumstances. Then contemplate, if you will, the existence of a fund derived from the proceeds of the sale of 150,000 acres of land, of no use or benefit to the state except as the interest of such fund might be applied to the payment of the expense of a janitor, an engineer

and repairs. Could congress ever have intended that such conditions should obtain? The utter absurdity of providing a fund to maintain and perpetuate the state capital building of Montana absolutely condemns any construction of the Enabling Act which would operate to create such a fund.

This court, in the case of State *v.* Cook, 17 Mont. 529, through Mr. Justice Hunt, said:

"When congress made a grant of land to the state for public buildings at the capital of the state, by Act of Congress, approved February 22, 1889, providing for the admission of the state into the union, it was enacted that the lands so granted should be
40 held, appropriated and disposed of exclusively for the purposes mentioned in the Act, in such manner as the legislature of the state might provide. The state, by Ordinance No. 1, Sec. 7, has accepted these lands for the purposes specified, and by legislation has provided for the erection of a capitol, exclusively out of the moneys from the fund to be created by the disposition of the lands so granted by congress. The state is an agent to carry out the objects of the donation. The fund created by the statute is a trust fund established by law in pursuance of the Act of congress. * * * The state officers have no control over it, except to carry out the trust relation; and the treasurer is merely an agent for receiving and disbursing the fund under the Act of congress, and in manner provided by the law of the state. So, too, the auditor is but one of the agents or sub-agents designated by the law of the state in the execution of the trust. All this seems very clear to us in the law."

Here we have a decision by this court that congress intended that the proceeds of the lands granted for public buildings at the capital should be used for the purpose of erecting such buildings.

In Sec. 14, containing the grant for a state university, it is provided that the lands shall be sold "and the proceeds shall constitute a permanent fund to be safely invested," etc. In Sec. 11, which this court says applies to the grant for common school purposes made by Sec. 10, it is provided that the proceeds shall "constitute a permanent school fund, the interest only of which shall be expended." In the grant for an agricultural college provision is made for the creation of a perpetual fund from the proceeds of the sales of the lands granted. So that, if congress had intended that the proceeds
41 of the lands granted by Sec. 17 should constitute a fund and only the interest should be used, it would certainly have made a provision to that effect as it did with reference to the grants of lands for common schools, for a university and for an agricultural college Instead of so providing it declared in Sec. 17 that the lands shall be "held, appropriated and disposed of exclusively for the purposes herein mentioned."

When it was declared that the lands should be appropriated it certainly was not meant that the rent derived from leasing the lands and the interest received from an investment of the proceeds of the lands sold should be appropriated. The lands are granted to the state, and the same lands are required to be appropriated for certain

purposes. No one could be found who would say that congress did not intend to grant the lands, but only the rent which might be derived from leasing the lands and the interest which might be obtained from the investment of the proceeds of the lands sold. It would seem to us that there is as much reason for saying that the lands were not granted as there is for saying that the lands are not to be appropriated, but only the rent which may be obtained from leasing the lands and the interest which may be received from an investment of the proceeds of the lands sold, are available for use. In Sec. 20 we find the word "appropriated" is used. In that section it is provided "that the sum of $20,000, or so much thereof as may be necessary, is hereby appropriated * * * for defraying the expenses" of the constitutional convention. Here the meaning of the word "appropriated," as used in the Enabling Act, is clearly shown.

In the opinion of this court it is said:

"Under the provisions of Sec. 17 of the Enabling Act the
42 legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not control the funds derived from sales or leases except in conformity with the constitutional provisions of Sec. 12 of Art. XI above."

Notwithstanding Sec. 17 declares that the lands shall be *appropriated* for the purposes for which the grants are made, this court says that the legislature has to do only with the "management and disposition of the lands themselves," and the right to control the funds received from sales and leases can not be exercised except in conformity with the Constitution. In other words, this court holds that the authority to manage and dispose of the lands in conferred by the Enabling Act, and the authority to appropriate the lands or the proceeds of such lands is conferred by the Constitution. So that, either no significance whatever is attached to the language of the Enabling Act conferring power upon the legislature to appropriate the lands, or Sec. 12 of Art. XI of the Constitution is considered as superior to the Enabling Act. The Constitution of the United States provides that such Constitution and "the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the laws or constitution of any state to the contrary notwithstanding." If, then, there is any conflict between Sec. 12 of Art. XI of the Constitution and the Enabling Act, the Constitution must yield. This proposition is fully discussed in the briefs of the relator, to which reference is hereby made.

The word "appropriated" means "applied." For a discussion of
43 the word "appropriated" and the sense in which it is used by congress in making grants of lands, reference is hereby made to the briefs for relator.

By Sec. 17 lands are granted to the state "for the establishment and maintenance of a school for mines * * * ; for state normal schools * * * ; for agricultural colleges." The sentence containing the grants for the different educational institutions referred to is an eliptical sentence. It is clearly to be inferred that the grant for a state normal school is for the "*establishment* and mainte-

nance of such institution. The rules of grammar will not admit of any other construction of the language used. Grants are also made "for the establishment of a state reform school," and "for the establishment of a deaf and dumb asylum." The school of mines, the normal school and the agricultural college are educational institutions; the reform school is a reformatory institution, and the deaf and dumb asylum is a charitable institution. We find that in Sec. 17 reference is made to educational, charitable, penal and reformatory institutions. It is evident that congress intended to provide for both the establishment and maintenance of the educational institutions, and intended to provide for only the establishment of the other institutions. The provision for both the establishment and maintenance of the educational institutions is in keeping with the general policy of the federal government to promote education. On the other hand, there is no reason why the charitable, penal and reformatory institutions should not be maintained at the expense of the state. The intention of congress to make provision for both the establishment and maintenance of the educational institutions and to provide for only the establishment of a reform school and a deaf and dumb asylum, is evidenced by the quantity of land granted
44 for these respective institutions. One hundred thousand acres is granted for a normal school and only fifty thousand acres for the reform school. It was evidently contemplated that one hundred thousand acres would be sufficient to provide for the establishment and maintenance of a normal school. The same is true with reference to the school of mines and the agricultural college.

Sec. 17 provides that the lands granted for the reform school shall be held, appropriated and disposed of exclusively for the purpose of the establishment of a state reform school. There is no basis whatever for saying that the grant for a state reform school is for the maintenance and perpetuation of such institution. The word "establish" does not mean "maintain." It is apparent that when congress intended that a grant should be for the purpose of *maintaining* an institution it used the proper word to express its intention.

Instead, therefore, of its being the intention of congress that the buildings of the state reform school should be provided by the state and the lands granted should be treated as an endowment to maintain and perpetuate the state reform school, as this court seems to hold, it was clearly the intention of congress that the lands should be *appropriated* to *establish* the institution, and the institution, after being established should be maintained and perpetuated by the state. The word "establish" includes the erection of buildings. The Constitution of the United States grants power to congress to establish post offices and post roads. It is pursuant to this power that the federal building in Helena was erected, and post office buildings have been erected throughout the United States.

45 If we are to say that congress, by providing for the *establishment* of a state reform school, intended to provide for the *maintenance* and *perpetuation* of such school, and in providing that the lands granted for the establishment of such institution shall be *appropriated* to such purpose, intended that only the

rent to be derived from the leasing of such lands and the interest from the investment of the proceeds of such part of said lands as might be sold, shall be appropriated, we are compelled to attribute to the members of congress a very slight knowledge of the English language.

If it was intended, as it clearly was, that the proceeds received from the sale of the lands granted for a state reform school should be used for the establishment of such an institution, then it necessarily follows that it was the intention of congress that the proceeds of the lands granted for the state normal school should be available for the purpose of the grant made for such institution. What has been said with reference to the language expressing the intent of congress embracing the grant for the erection of public buildings at the capital of the state applies equally to the grant for a state reform school.

In the opinion this court said:

"The lands were granted to the State of Montana—not to the legislative assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived
from sales or leases pass to the state, to be disposed of by the
46 state as it may see fit, subject only to the condition that they
shall be used exclusively for normal school purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its legislative assembly."

It is also decided, according to our understanding of the opinion, that except for the provisions of Sec. 12 of Art. XI of the Constitution, the state might, through its legislature, determine whether or not the proceeds derived from the sale of lands should be utilized, or only the interest obtained by the investment of such proceeds could be used. The language of the Enabling Act is that there is granted to the State of Montana "for state normal schools, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for state normal schools in such manner as the legislature of the state may provide. It is true that the grant is to the state, but, as declared in Sec. 1 of Art. XVII of the Constitution, the lands "shall be held in trust for the people, to be disposed of as hereinafter provided," for the purpose for which they have been granted. The state receives the title in trust for the people, who are the beneficiaries. It is not the state to which power is granted to determine the manner in which the lands shall be held, appropriated and disposed of, but such power is conferred upon the legislature of the state. There is a clear distinction between the state and the legislature of the state. In the case of Poindexter *v.* Greenhow, 114 U. S. 270, it is said: "The state is a political corporate body, can act only through its agents, and can command only by

laws." In speaking of the distinction between the govern-
47 ment of a state and the state itself, the court says:

"In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, unchangeable, invisible, immutable. The government is an agent, and, within the scope of the agency, a perfect representative; but outside of that it is a lawless usurpation. The constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof."

It would seem that this court, in its opinion, has confounded the legislature of the state with the state itself. As already stated, the grant was made to the state in trust for the people, and it was declared that the trust should be executed by the legislature, not by the state. The legislature is a branch of the state government and, as said in the opinion in the case of Poindexter *v.* Greenhow, *supra,* "both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof." When, therefore, congress declared that the lands granted should be held, appropriated and disposed of for the purposes for which they were granted in such manner as the legislature of the state might provide, it did not mean to confer power upon the state, but it was clearly the intention to grant the power to the legislature as distinguished from the state. By no rule of statutory con-
48 struction can the word "legislature" be said to mean "state."

It is provided in the Constitution of the United States that "this constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution of laws of any state to the contrary notwithstanding." If, therefore, congress intended that the legislature of the State of Montana should determine whether or not the proceeds received from the sale of the lands granted for a state normal school, or only the interest which might be received from the investment of such proceeds, should be used, the right so to determine having been granted by the law of the United States enacted in pursuance of a provision of the Constitution of the United States granting to congress the power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States" (Sec. 3, Art. IV), the state could not, through its constitution or otherwise, limit or impair the power thus granted to the legislature.

III.

We submit that Sec. 12 of Art. XI of the Constitution of Montana does not, when properly construed, require that the proceeds received from the sale of lands granted for state normal schools shall be in-

vested, and prohibit the use of such proceeds, and that if it is to be so construed, it is clearly in conflict with Sec. 17 of the Enabling Act, and of no force or effect whatever. For our views as to the proper construction of Sec. 12 of Art. XI, see the briefs filed in behalf of relator.

49 The attorney general contended that the proceeds received from the sale of lands granted for state normal schools can not be used because of the provisions of Sec. 11 of the Enabling Act. This court has decided that the provisions of Sec. 11 apply only to lands granted for common schools. It was assumed on the argument of this case by the attorneys for the relator that if Sec. 11 does not apply to the lands granted by Sec. 17, then the right to the use of the proceeds received from the sale of the lands granted by such section exists. Under the circumstances, and in view of the fact that the construction adopted by this court was not presented or argued, and in consideration of the importance of the case to the people of Montana, we submit that a rehearing should be granted and argument heard as to the proper construction of Sec. 17, when construed independently of Sec. 11.

Respectfully submitted,

CARPENTER, DAY & CARPENTER,
W. T. PIGOTT,
M. S. GUNN,
Attorneys for Relator.

Service of the within petition admitted and receipt of copy thereof acknowledged this 20th day of January, A. D. 1906.

ALBERT J. GALEN,
Attorney for Defendant.

Endorsed: Filed January 20, 1906. John T. Athey, Clerk.

50 *Minutes of the Court, February 27th,* 1906.

Order Correcting Opinion and Denying Petition for Rehearing.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

It is this day by the court ordered that the following corrections in the opinion heretofore filed in this cause, be made, and that the opinion be engrossed accordingly: viz: strike out the last five words on page 5, and all of first paragraph on page 6. Strike out all of the first paragraph on page 10, after the first sentence thereof. Transpose the order of the paragraph before the last and second before the last with the last paragraph on page 13. After the word "seem," in the last paragraph on page 13, insert "that the early sessions of our legislature understood." Strike out all of the last paragraph on page 14, and all of page 15, excepting the last paragraph.

The relator's petition for a rehearing herein heretofore submitted and by the court taken under advisement, is this day by the court denied.

51 STATE OF MONTANA.

In the Supreme Court, December Term, 1905.

No. 2258.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

Submitted December 9, 1905; Decided January 9, 1906.

Filed February 27, 1906. John T. Athey, Clerk.

Mr. Justice HOLLOWAY delivered the opinion of the Court:

The Ninth Legislative Assembly of Montana passed an Act entitled "An Act to enable the Normal School Land Grant to be further utilized in providing Additional Buildings and Equipment for the Montana State Normal College," approved February 2, 1905. This Act authorizes the state board of land commissioners to issue bonds, sell the same, and apply the proceeds to the erection, furnishing and equipment of an addition to the present state normal school building at Dillon. It is provided that the funds realized from the sale or leasing of the lands granted by the United
52 States to Montana for state normal school purposes (100,000 acres), and the licenses received from permits to cut timber on any of said lands, are pledged as security for the payment of the principal and interest on such bonds, except such sums as may be necessary to pay other bonds heretofore issued. There is the further provision that the State of Montana shall not be liable for the payment of the bonds or the interest.

Pursuant to the provisions of this Act the state board of land commissioners issued coupon bonds to the amount of $75,000, dated May 1, 1905, in denominations of $1,000 each, bearing interest at four per cent. per annum, payable semi-annually, and caused the same to be executed as prescribed by such Act. Thereafter such bonds were duly advertised for sale by the state treasurer, and the state board of land commissioners submitted a bid for said bonds at par as an investment for the permanent common school fund, which bid was accepted and, presumably, the money for the bonds paid over to the credit of the building fund of the normal school, although this does not appear affirmatively from the petition filed herein.

This relator, having performed services in connection with the erection of the addition to the State Normal School building, presented a claim for $1,200 to the executive board of the State Normal School, which was allowed and approved by that board, and allowed

and ordered to be paid by the state board of examiners, a warrant issued for the same by the state auditor, and this warrant presented by the relator to the state treasurer who refused to pay it. Thereupon this proceeding in *mandamus* was commenced to compel the state treasurer to pay said warrant. An alternative writ and
53 an order to show cause issued, and upon the return the state treasurer, represented by the attorney general, moved to quash the alternative writ and dismiss the proceedings upon the ground that the petition for the writ does not state facts sufficient to entitle the relator to any relief.

The contention of the respondent is, that the Act of the Legislative Assembly above referred to is unconstitutional, first, because the Act authorizes the expenditure of funds received from he sale of the Normal School lands for the payment of these bonds; second, because the issuance of said bonds increases the indebtedness against the state of Montana to an amount in excess of $100,000; and, third, because the Act authorizes the expenditure of the money for the erection of a building for the State Normal School.

By the provisions of Section 17 of the Act of Congress, approved February 22, 1889 (25 Stat. at Large, 676), commonly known as the Enabling Act, there was granted to the state of Montana "For State Normal Schools" 100,000 acres of the public land. Oher grants were made for the school of mines, the agricultural college, the state reform school, the deaf and dumb asylum, and the state capital buildings; and by other sections of the same Act a grant of 72 sections of the public land was made for a university, and grants, additional to those mentioned in section 17, for the state capital buildings and agricultural college.

Other like grants of land were made by the same Act to the States of North Dakota, South Dakota and Washington, and of the grants made by section 17 it is said: "And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, and in such manner as the legisla-
54 tures of the respective states may severally provide."

Section 5 of the Act of February 2, 1905, provides, that the state treasurer shall keep all moneys derived from the sale, leases, or sale of timber from lands granted in aid of the state normal school, in a separate fund to be known as "The State Normal School Fund," and out of this fund he shall pay the interest on these bonds as it accrues, and the principal at maturity.

Section 12 of Article XI of the Constitution of Montana provides: "The funds of the state university and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or conversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

Beyond question the state normal school is one of the institutions of learning to which reference is here made, and as it is the only one with which we are directly concerned in this proceeding, we may paraphrase section 12 above, as follows: The funds of the state normal school, from whatever source secured shall be invested as prescribed by law, and the interest from such invested funds, together with the rent from leased lands belonging to the normal school grant, shall be devoted to the maintenance of such normal school.

The provisions of this section of the Constitution are mandatory and prohibitory. (Section 27, Article III.) *The funds* re-
55 ferred to mean *all* funds. They shall be invested *to draw interest* and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant which have not been sold—and not the principal sum derived from the sale of such lands or from the sale of timber—shall be used for the maintenance and perpetuation of the normal school, and for no other purpose.

If, then, the principal sum received from the sale of lands belonging to the normal school grant must be invested to draw interest, that principal sum can not be used to pay off the principal of or interest on the bonds authorized by the Act of February 2, 1905, as provided by such Act.

It is apparent from the most casual reading of section 12 of Article XI of the Constitution, and section 5 of the Act of February 2, 1905 above, that as soon as the treasurer receives any moneys from the sale of normal school lands or timber therefrom into "the State Normal School fund," such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the rents from leased lands, can be devoted to the maintenance and perpetuation of the normal school. If this section of the Constitution is to be given force and effect, it is apparent that the Act in diverting the moneys received from the sale of normal school lands, or the sale of timber therefrom, to the payment of these bonds is in direct violation of the provisions of this section of the Constitution.

But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act, the lands granted to the state for normal school purposes are to be held, appropriated and disposed of for normal school purposes in such manner as the legislature
56 of Montana may provide, and that this Act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of Article XI of the Constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect. It is perfectly apparent, then, that in order to hold the act of the legislature approved February 2, 1905, binding and the bonds issued in pursuance thereof valid, this court must hold section 12 of Article XI of the Constitution inoperative and of no effect. However, as the Constitution of Montana is the supreme law of this state, aside from the provisions of the Constitution of the United States and the treaties made

and statutes enacted in pursuance thereof, it becomes incumbent upon this court to reconcile, if possible, the provisions of our Constitution with the Enabling Act under which the Constitution was adopted and the state admitted into the Union, for, however reluctant a court is to declare unconstitutional and invalid an Act of a legislative assembly, it will with even greater hesitation hold inoperative and invalid a provision of a state Constitution.

It is to be observed that the lands granted to the state by the Enabling Act are granted for specific purposes which are clearly defined: 100,000 acres are granted for state normal schools, and the only limitation upon the grant is, that such lands shall be held, appropriated and disposed of exclusively for the purposes mentioned, in such manner as the legislature may provide. Under section 17 above, the legislature might designate the agent to select and classify the lands. It might specify that the lands should be sold at
57 private sale or at public auction. It might specify the quantity of land to be sold at any one time, or the amount to be sold to any one individual. It might provide the terms upon which the land should be sold, and the price to be received for it. It might make suitable provision for renting the land, and fix the amount to be let to any one person and the price at which it should be let; and, finally, it might make provision for the sale of growing trees upon the lands selected under the terms of this grant. All of these provisions in section 17 were met by the legislative enactment comprised in Title VIII, Part III, of the Political Code.

The question now arises: Does section 12 of Article XI of the Constitution contravene the provisions of section 17 of the Enabling Act? Is there any conflict between the provisions of the Enabling Act, which grants to the state legislature authority to prescribe the manner in which these normal school lands shall be held, appropriated and disposed of,—and the provisions of section 12 of Article XI of the Constitution, which provides that the funds of the state normal school shall be invested and only the interest from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the state normal school? We are of the opinion that there is no conflict whatever. Under the provisions of section 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not control the funds derived from sales or leases except in conformity with the constitutional provisions of section 12 of Article XI above.

The lands were granted to the state of Montana,—not to
58 the Legislative Assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for normal school purposes. The state may act through its constitutional convention, and, if it does so, such section

is conclusive. In the absence of constitutional provision, it may act through its legislative assembly. Therefore, when the constitution says that all moneys coming into the state normal school fund, from whatever source, shall be invested and only the interest and rental from leased lands shall be used for normal school purposes, the legislature may prescribe the manner in which the funds shall be loaned, but it can not say that they shall go into any other channed. The absence of any constitutional provision respecting the grant for capital building purposes, and the grant of the penitentiary at Deer Lodge city and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed.

In the very highest sense the purpose of the grant in aid of the state normal school is observed and carried into effect by section 12 of Article XI of the Constitution. In the wisdom of the framers of that instrument, provision is made for the support of our state normal school for all time. The principal sums derived from the sales of the lands or of timber are made to serve this institu-
59 tion by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate.

A great deal of consideration was given by counsel to the question whether or not the language of section 11 of the Enabling Act modifies the language of section 17; and while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case.

Neither are we disposed to enter into a discussion now as to whether the bonds authorized by this Act increase the state debt.

So far as the other question is concerned it need only be noticed in passing. The United States granted 100,000 acres of land to Montana "for state normal schools." The congress was only concerned in seeing that this grant was applied to the purpose for which made. It was apparent that in order to be available, the lands must be utilized, and the congress therefore left it to the legislature of this state to designate the manner in which such lands should to be held, appropriated or disposed of; but it went no further than this. It did not attempt to say when the normal school should be instituted; how many normal schools should be established; or how the funds derived from the sale or leasing of these lands should be controlled or made to work out most effectually the end sought by the grant.

The constitutional convention adopted Ordinance No. 1, whereby the grant of these lands was accepted upon the terms and conditions provided in the Act; and as an extra precaution and as an additional safeguard, section 12 of Article XI of the Constitution was
60 adopted, making the grant in fact an endowment, and only the interest and rental immediately available for the use of the school and such interest and rental may be used for any legitimate purpose connected with the maintenance or perpetuation of the school.

But it is said that other like bond issues have been made against these various land grants, and that for a number of years the legislative and executive branches of this state government have given to

section 17 of the Enabling Act the construction for which contention is now made by this relator, and that such construction ought to be given great weight by this court. But, as we said before, such construction has the effect of nullifying a section of our state constitution, and this court ought to be slow indeed to declare such a result, no matter of the legislative and executive branches of the state government may have done so. Furthermore, the rule that contemporaneous construction by the department specially delegated to carry into effect a particular provision of law shall raise a strong presumption that such construction rightly interprets the provision, only becomes effective when there is a reasonable doubt as to the meaning of the provision. Such construction can never abrogate the text or fritter away its obvious sense. And acquiescence for no length of time in a construction by the coordinate branches of the government which has the effect of nullifying a provision of the Constitution, will justify a court in adopting such construction unless it is the only reasonable one. (Cooley on Constitutional Limitations, 7th ed., 104-106.) Furthermore, such construction to be available as an argument, must have been uniform, and such is not the fact with reference to the subject now under consideration.

61 The Enabling Act was passed February 22, 1889, and it is not contended that any attempt was ever made by the legislative or executive departments of the state government to give to section 17 the construction now claimed for it by relator, prior to March 6, 1895, when the first of these bond issues was authorized (Secs. 1630-1637, Political Code); so that the construction thereafter given by the legislature was not in fact contemporaneous with the passage of the Act. But, on the other hand, the constitutional convention met in July, 1889, and adopted section 17 of Article XI as the expression of its interpretation of section 17 of the Enabling Act, and the Second Legislative Assembly passed an Act entitled "An Act to Provide for the selection, location, appraisal, sale and leasing of state lands," approved March 6, 1891 (Laws of 1891, page 174*a*), by the terms of which it is specifically provided that all moneys derived from the sale of these lands shall be invested, and only the interest of such invested funds and rental from leased lands shall be used for the purpose for which the grant was made. These provisions were re-enacted in an Act of the Third Legislative Assembly, approved March 9, 1893 (Session Laws, 1893, page 49), and again re-enacted in a Code provision (Sec. 3509, Political Code), approved February 25, 1895.

Thus, within five months after the Enabling Act was passed, we have a construction of section 17 of it, by the constitutional convention, directly opposed to the view now urged by relator; and we further have apparently the same construction placed upon it, or at least an attempt to carry into effect the idea of the framers of the

62 Constitution, by every session of the legislature, barring the first, which did not accomplish anything in the way of legislation,—from the time of the passage of the Enabling Act to March 6, 1895; and it does not affect the result to say the various institutions had not been established prior to 1893.

It would seem that the early sessions of our legislature understood that the Congress meant that the state of Montana should in the first instance build the necessary buildings for a state normal school out of its own proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter; and that this was the construction given to section 17 of the Enabling Act by our Legislative Assembly is demonstrated by the action taken by it at the time these several state institutions were established. The Third Legislative Assembly provided for the establishment and location of the agricultural college, the university, the normal school and school of mines, and made an appropriation for each of these institutions. That for the state normal school is similar to the others, and provides for an appropriation of $15,000, and respecting this appropriation the Act says: "The money hereby appropriated, shall be expended under the direction of the state board of education, in the manner and under such restrictions as may be provided by law, and for the purpose of establishing said state normal school, by commencing the construction of suitable buildings for maintenance of said state normal school." It was clearly the understanding of the Legislative Assembly at that time that the state itself must erect the buildings, and it provided for the commencement of such work evidently with the idea that future legislatures would make other appropriations to complete the work then initiated.

63 So that the construction given to section 17 of the Enabling Act by the Montana legislature has not been uniform, even if the terms of that section were of doubtful meaning, which does not appear to be the fact.

We do not think that the construction given to that section since 1895 has been done under such circumstances, or that the result to be anticipated from a different construction now by the courts is of such character as to render applicable here the maxim *"Communis error facit just."*

While we do not agree with the reasoning of the supreme courts of Washington and North Dakota respecting the meaning of section 11 of the Enabling Act, it is interesting to note that they have held legislation of the character of the Act of February 2, 1905, invalid, and bond issues similar to that authorized by our legislature, void, and that, too, under the same Enabling Act and somewhat similar constitutional provisions. (State *ex rel.* Heuston *v.* Maynard, 31 Wash. 132, 71 Pac. 775; State *ex rel.* Board *v.* McMillan, (N. D.), 96 N. W. 310).

The Act of the legislature now under consideration is authorizing the expenditure of moneys received from the sale of normal school lands, or of the timber on lands granted in aid of the state normal school, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI, of the state Constitution, and is therefore void and of no effect; and, being so, the state treasurer rightly refused to proceed under it and can not be coerced by *mandamus.*

The alternative writ of mandamus is quashed and these proceedings are dismissed.

Dismissed.

64 WM. L. HOLLOWAY,
Associate Justice.

I concur:
THEO. BRANTLY,
Chief Justice.

Mr. Justice MILBURN: I concur in the opinion. I think it is well, however, inasmuch as a great deal is said in the opinion, and very properly, in regard to contemporaneous construction, that the statements made in the body of the bonds themselves in respect to the validity thereof, should appear. Section 3470 of the Political Code declares that the governor, the superintendent of public instruction, the secretary of state, and the attorney general shall constitute the state board of land commissioners. As appears from an inspection of the bonds, these officers signed each of said bonds. In each bond appears the following statement: "It is hereby recited and certified that this bond is issued in strict complicance with and conformity to * * * the constitution and laws of the state of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the state board of land commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon as herein and in said act provided." As shown in the opinion, the bonds are not in compliance with the Constitution. I think it proper that this construction of the law by the several executive officers of the state who signed the bonds,
65 given at the time of the issuance of the bonds, should appear as part of the history of the case.

That part of section 17 of the Enabling Act saying that "the lands granted * * * shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide," means, in my opinion, in a few words, this: that the legislature may say *how* the lands may be sold, but does not mean that they shall say what shall be done with the proceeds. The Constitution, in my opinion, is controlling in the matter, and is not in violation of any of the provisions of the Enabling Act.

GEO. R. MILBURN,
Associate Justice.

66 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Plaintiff in Error,

vs.

JAMES H. RICE, as State Treasurer, Defendant in Error.

Petition for Writ of Error.

To the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana:

The petition of Charles S. Haire respectfully shows that, on the 9th day of January, A. D. 1906, the Supreme Court of the State of Montana rendered a final judgment against your petitioner in a certain cause or proceeding, wherein the State of Montana *ex rel.* your petitioner was relator, and James H. Rice, as State Treasurer, was respondent, denying the application of your petitioner for a writ of mandate and dismissing the said proceeding or cause, and for costs, as will appear by reference to the record in said cause; and that said court is the highest court in said state in which a decision in said proceeding or cause could be had.

And your petitioner further represents that in said cause or proceeding, as appears from the record therein, the authority of the Legislative Assembly of the State of Montana to appropriate and apply the proceeds received from the leasing and sale of the
67 lands granted to the State of Montana for state normal schools by section 17 of the Act of Congress approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the "Enabling Act," to the establishment of such schools, was drawn in question, and the said Supreme Court decided that such authority does not exist; that it was also contended by your petitioner, as appears from said record, that Section 12 of Article XI of the Constitution of the State of Montana is repugnant to the said Act of Congress, and furthermore violates the obligation of the contract resulting from the acceptance of the grant made by said Section 17 of said Act of Congress, and the decision of said Supreme Court in said cause was in favor of the validity of said constitutional provision; and that it was also claimed by your petitioner, as appears from the record in said proceeding or cause, that by virtue of the provisions of Section 17 of said Act of Congress, and the Act of the Legislative Assembly of the State of Montana approved February 2, 1905, entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal school," he is entitled to payment of the amount due him for services performed in connection with the erection of such buildings, as appears from the petition to said Supreme Court for a writ of mandate, constituting a part of the record in said proceeding or cause, out of the proceeds received from the sale of the bonds issued pursuant to said Act of the Legislative Assembly of the State of Montana,

and said claim was denied by the decision of said Supreme Court in said proceeding or cause.

And your petitioner further represents that the said Su-
68 preme Court, in holding and deciding as aforesaid, committed errors to the prejudice of your petitioner, which will more in detail appear from the assignment of errors filed with this petition.

Wherefore, your petitioner prays the allowance of a writ of error, returnable in the Supreme Court of the United States, and for citation; and your petitioner will ever pray, etc.

M. S. GUNN,
Attorney for Petitioner.

Let the writ of error issue as prayed.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Plaintiff in Error,
vs.
JAMES H. RICE, as State Treasurer, Defendant in Error.

Bond.

Know all men by these presents: That we, Charles S. Haire, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto James H. Rice, as State Treasurer, in the sum of Five Hun-
69 dred Dollars ($500.00) to be paid to the said obligee, his successors, personal representatives or assigns, to which payment well and truly to be made the said principal binds himself, his heirs and personal representatives, and the said surety binds himself, its successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of March, 1906.

Whereas, the above named Charles S. Haire hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Montana:

Now, therefore, the condition of this obligation is such that, if the above named Charles S. Haire shall prosecute his said writ of error to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES S. HAIRE, *Principal.*
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK BOGART, *Its Attorney in Fact.*

I hereby approve the foregoing bond and surety this 17th day of March, 1906.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Endorsed: Filed March 17, 1906. John T. Athey, Clerk.

70 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Plaintiff in Error,

vs.

JAMES H. RICE, as State Treasurer, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error in the above entitled cause and says that the Supreme Court of the State of Montana erred in its decision and judgment in said cause, as appears from the record therein, and that the errors committed are as follows, to-wit:

I.

The said court erred in holding and deciding that the Act of Congress approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the "Enabling Act," does not authorize the Legislative Assembly of the State of Montana to appropriate or apply the proceeds derived from the sale or leasing of the lands granted to said state by Section 17 of said Act for state normal schools, or from the sale of the timber thereon, to the establishment of such schools.

The court erred in holding that Section 12 of Article XI of the Constitution of the state, as construed by said court, is not
71 repugnant to Section 17 of said Act of Congress, and is valid.

III.

The court erred in holding and deciding that Section 12 of Article XI of the Constitution of the State of Montana, as construed by said court, does not impair the obligation of the contract resulting from the acceptance of the grant of lands made to the State of Montana by Section 17 of said Act of Congress.

IV.

The court erred in holding and deciding that the proceeds derived from the sale of said lands and the timber thereon constitute a permanent fund, no part of which can be used to establish a state normal school, or for any other purpose, except that of investment.

V.

The court erred in holding and deciding that the interest received from the investment of the proceeds of the sale of said lands

and the timber thereon, together with the rents derived from leasing said lands, can be used only for the purpose of maintaining and perpetuating a state normal school.

VI.

The court erred in holding and deciding that the Act of the Legislative Assembly of the State of Montana, entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the state normal school college," approved February 2, 1905, is invalid, as being in conflict with Section 12 of Article XI of the Constitution of the State of Montana.

72 VII.

The court erred in denying the application of plaintiff in error for a writ of mandate.

Wherefore, the said Charles S. Haire, plaintiff in error, prays that, for the errors aforesaid, and other errors appearing in the record of the said Supreme Court in said cause, to his prejudice, that the said judgment may be reversed.

M. S. GUNN,
Attorney for Plaintiff in Error.

Endorsed: Filed March 17th, 1906. John T. Athey, Clerk.

73 STATE OF MONTANA,
Office of the Clerk of the Supreme Court, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing, from page 1 to page 72, inclusive, is a complete and true transcript of the record in the case of the State of Montana *ex rel.* Charles S. Haire *vs.* James H. Rice, as State Treasurer, as appears from the papers, records and proceedings in said cause on file in my office, including a copy of the original opinion of said court, filed on January 9, 1906, in said cause, which was corrected and changed as required by the order of said court, and which is no longer on file in my office, having been merged into the opinion of the court as corrected by the order of February 27, 1906; together with the assignment of errors filed in connection with the petition for a writ of error therein.

And I further certify that there is attached to said transcript the writ of error and citation issued in said cause, which, together with the said transcript and assignment of errors, are transmitted to the Supreme Court of the United States in obedience to the command of said writ of error.

Witness my hand and the seal of said court this 26th day of March, 1906.

[Seal Supreme Court State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court
of the State of Montana.

74 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana, before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had, in the said action or suit between the State of Montana *ex rel.* Charles S. Haire, relator and plaintiff in error, and James H. Rice, as State Treasurer, respondent and defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission;

75 a manifest error hath happened to the great damage of the said Charles S. Haire, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 16th day of May, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of March, in the year of our Lord one thousand nine hundred and six.

[Seal United States Circuit Court, District of Montana.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States,
Ninth Circuit, in and for the District of Montana.

Allowed by:
THEODORE BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

76 [Endorsed:] 2258. Writ of Error to the Honorable the Justices of the Supreme Court of the State of Montana. Filed March 17" 1906. John T. Athey, Clerk.

77 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To James H. Rice, as State Treasurer, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Montana, wherein the State of Montana *ex rel.* Charles S. Haire is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana, this 17th day of March in the year of our Lord one thousand nine hundred and six.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Service of the foregoing Citation admitted and receipt of a copy thereof acknowledged this 17" day of March, 1906.

ALBERT J. GALEN,
Attorney General of the State of Montana.

78 [Endorsed:] 2258. Citation To James H. Rice, as State Treasurer. Filed M'ch 19" 1906. John T. Athey, Clerk.

Endorsed on cover: File No. 20,195. Montana supreme court. Term No. 693. The State of Montana *ex rel.* Charles S. Haire, plaintiff in error, vs. James H. Rice, as State treasurer. Filed April 16th, 1906. File No. 20,195.

FILE COPY.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1905.

No. 252.

THE STATE OF MONTANA ex rel CHARLES S. HAIRE,
Plaintiff in Error,

vs.

JAMES H. RICE, AS STATE TREASURER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

M. S. GUNN,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1905.

No. 693.

THE STATE OF MONTANA ex rel CHARLES S. HAIRE,

Plaintiff in Error,

vs.

JAMES H. RICE, AS STATE TREASURER,

Defendant in Error.

STATEMENT OF CASE.

Section 17 of an act of congress entitled "An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states," approved Feb. 22, 1889, known

as the "Enabling Act," and hereinafter referred to as such, reads as follows:

> "That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September 4, 1841, which act is hereby repealed as to the states provided for by this act, and in lieu of any claim or demand by the said states, or either of them, under the act of September 28, 1850, and section 2479 of the revised statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared is not extended to the states provided for in this act, and in lieu of any grant of saline lands to said states, the following grants of land are hereby made, to-wit: * * *
>
> "To the state of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for state normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres. * * *
>
> "That the states provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of, exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

The constitutional convention which formed the Con-

stitution for Montana adopted an ordinance designated as "Ordinance No. 1," entitled "Federal Relations," in which it was ordained that:

> "The state hereby accepts the several grants of land from the United States to the state of Montana, mentioned in an Act of Congress, entitled 'An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states,' approved Feb. 22, 1889, upon the terms and conditions therein provided."

The ninth legislative assembly of Montana passed an act entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal college," approved Feb. 2, 1905. A copy of this act is appended hereto at pp. 40 to 45. Pursuant to the authority and the directions of said act the state board of land commissioners issued coupon bonds to the amount of $75,000. A copy of one of said bonds is contained in the record at pp. 4 and 5. The bonds were sold to the state, payment being made therefor out of the common school fund. In Section 7 of said act it is provided:

> "The moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the present state normal school building, at Dillon, Montana."

Plaintiff in error performed services in connection with the erection of an addition to the state normal school

building at Dillon, Montana, in the capacity of an architect and as superintendent of construction of said addition, of the reasonable value of $1,200. He presented a claim for $1,200, the value of such services, which was regularly approved and ordered paid by the state board of examiners, whereupon a warrant was issued to him for the amount thereof by the state auditor. This warrant was presented to the defendant in error for payment, and payment was refused.

Plaintiff in error applied to the supreme court of the state for a writ of mandate requiring defendant in error to pay said warrant out of the fund created by the sale of said bonds (Record, pp. 1-5). An alternative writ of mandate was issued. The defendant in error interposed a demurrer to the petition for the writ and a motion to quash the alternative writ (Record, pp. 7 and 8). The motion to quash was sustained (Record, pp. 8 and 9). The opinion of the court appears in the record on pp. 9-17. A petition for rehearing was filed (Record, pp. 18-27). The court, after making certain corrections in its opinion, denied a rehearing (Record, pp. 27 and 28). The corrected opinion is found in the record at pp. 28-35.

Section 12 of Article XI of the Constitution of Montana provides:

> "The funds of the state university and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall

be devoted to the maintenance and perpetuation of these respective institutions."

The court in its opinion, referring to said section 12 of article XI of the Constitution, said:

"The provisions of this section of the Constitution are mandatory and prohibitory. (Sec. 27, Art. III.) *The funds* referred to mean *all* funds. They shall be invested *to draw interest* and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant which have not been sold—and not the principal sum derived from the sale of such lands or from the sale of timber—shall be used for the maintenance and perpetuation of the normal school, and for no other purpose.

"If, then, the principal sum received from the sale of lands belonging to the normal school grant must be invested to draw interest, that principal sum can not be used to pay off the principal of or interest on the bonds authorized by the Act of February 2, 1905, as provided by such Act.

"It is apparent from the most casual reading of Sec. 12 of Art. XI of the Constitution, and Sec. 5 of the Act of February 2, 1905, above, that as soon as the treasurer receives any moneys from the sale of normal school lands or timber therefrom into 'the state normal school fund,' such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the rents from leased lands, can be devoted to the maintenance and perpetuation of the normal school. If this section of the Constitution is to be given force and effect, it is apparent that the Act in diverting the moneys received from the sale of normal school lands, or the sale of timber therefrom, to the payment of these bonds is in direct violation of the provisions of this section of the Constitution."

It was further held by such court that section 17 of the Enabling Act is not in conflict with section 12 of article XI of the Constitution. In the opinion it is said:

> "The question now arises: Does Sec. 12 of Art. XI of the Constitution contravene the provisions of Sec. 17 of the Enabling Act? Is there any conflict between the provisions of the Enabling Act, which grants to the state legislature authority to prescribe the manner in which these normal school lands shall be held, appropriated and disposed of,—and the provisions of Sec. 12 of Art. XI of the Constitution, which provides that the funds of the state normal school shall be invested and only the interest from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the state normal school? We are of the opinion that there is no conflict whatever. Under the provisions of Sec. 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not control the funds derived from sales or leases except in conformity with the constitutional provisions of Sec. 12 of Art. XI above."

The court, in concluding its opinion, said:

> "The Act of the legislature now under consideration in authorizing the expenditure of moneys received from the sale of normal school lands, or of the timber on lands granted in aid of the state normal school, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of Sec. 12, Art. XI, of the state Constitution, and is therefore void and of no effect; and, being so, the state treasurer rightly refused to proceed under it and can not be coerced by mandamus."

It is contended in behalf of plaintiff in error that sec-

tion 17 of the Enabling Act contains a grant to the state of Montana of 100,000 acres for the *establishment,* as well as the maintenance, of state normal schools; and that authority is conferred by said section upon the legislative assembly of Montana to dispose of the lands thus granted and appropriate the proceeds to the *establishment* and maintenance of such schools.

It is further contended in behalf of plaintiff in error that when the grant contained in section 17 of the Enabling Act was accepted by the constitutional convention a contract resulted, and that section 12 of article XI of the Constitution of the state, as construed by the supreme court, impairs the obligation of such contract.

The questions for consideration by this court are:

1. Does the Enabling Act authorize the legislative assembly of the state of Montana to appropriate the proceeds derived from the sale and leasing of the lands granted to said state by section 17 of said Act for state normal schools and from the sale of the timber thereon, to the establishment of such schools?

2. If section 17 of the Enabling Act authorizes the legislative assembly of the state to appropriate the proceeds derived from the said lands to the establishment of state normal schools, does said section 17, or section 12 of article XI of the Constitution, as construed by the supreme court of the state, control?

3. Did the acceptance of the grant contained in section 17 of the Enabling Act constitute a contract?

4. If the acceptance of such grant created a contract

does section 12 of article XI of the Constitution of the state impair the obligation of such contract?

SPECIFICATION OF ERRORS.

I.

The supreme court of the state erred in holding that the Act of Congress approved Feb. 22, 1889, providing, among other things, for the admission of Montana into the union, does not authorize the legislative assembly of the state of Montana to appropriate or apply the proceeds derived from the sale or leasing of the lands granted to said state by section 17 of said Act for state normal schools, or from the sale of the timber thereon, to the establishment of such schools.

II.

The court erred in holding that section 12 of article XI of the Constitution of the state, as construed by said court, is not repugnant to section 17 of said Act of Congress.

III.

The court erred in holding that section 12 of article XI of the Constitution of the state of Montana, as construed by said court, does not impair the obligation of the contract resulting from the acceptance of the grant of lands made to the state of Montana by section 17 of said Act of Congress.

IV.

The court erred in deciding that the Act of the legis-

lative assembly of the state of Montana, entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the state normal school college," approved Feb. 2, 1905, is invalid, as being in conflict with section 12 of article XI of the Constitution of the state of Montana.

V.

The court erred in denying the application of plaintiff in error for a writ of mandate.

BRIEF AND ARGUMENT.

Did the Supreme Court of the state correctly construe the Enabling Act?

The supreme court of the state first construes section 12 of article XI of the Constitution, and then holds that section 17 of the Enabling Act does not conflict therewith. By the construction placed upon the section of the Constitution referred to the proceeds derived from the sale of the lands granted for state normal schools can not be used for any purpose except that of investment, and the interest received from the investment of such proceeds, together with the rents from the lands thus granted and remaining unsold can be used for the maintenance and perpetuation of the normal schools, and for no other purpose.

Section 17 of the Enabling Act contains the following grant of lands to the state of Montana:

"For the *establishment* and maintenance of a school

of mines, 100,000 acres; for state normal schools, 100,000 acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, 50,000 acres; for the establishment of a state reform school, 50,000 acres; for the establishment of a deaf and dumb asylum, 50,000 acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, 150,000 acres."

The section further provides that

> "* * * *The lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."*

The provision that the lands granted by the section shall be held, appropriated and disposed of exclusively for the purposes therein mentioned is not limited to the grant for a state normal school, or to the grants made for the other educational institutions, but applies generally to all of the lands granted by the section.

If, then, it was the inteniion of congress that the grant to the state normal school "should constitute an endowment for the maintenance and perpetuation of such school," as stated by the court in its opinion, it certainly follows that congress also intended that the grant for public buildings at the capital of the state should constitute an endowment for the maintenance and perpetuation of such buildings. This must be so, or the language used in expressing the intention has one meaning as applied to the grant for a normal school, and another meaning as applied to the grant for buildings at the capital.

Section 12 of the Enabling Act contains a grant to each

of the states of fifty sections of land "for the purpose of erecting public buildings at the capitals of the states, for legislative, executive and judicial purposes." The grant contained in section 17 for public buildings at the capital of the state is declared to be "in addition to the grant hereinbefore made for that purpose." The purpose of the grant contained in section 12 is to erect buildings, and it necessarily follows that the purpose referred to in section 17 is the same purpose. When, therefore, we consider the grant for the erection of public buildings at the capital of the state, it is impossible to find the intent that the lands granted should constitute an endowment for the maintenance and perpetuation of such buildings.

The supreme court of the state, in the case of State v. Cook, 17 Mont. 529, through Mr. Justice Hunt, said:

> "When congress made a grant of land to the state for public buildings at the capital of the state, by act of congress, approved Feb. 22, 1889, providing for the admission of the state into the union, it was enacted that the lands so granted should be held, appropriated and disposed of exclusively for the purposes mentioned in the act, in such manner as the legislature of the state might provide. The state, by Ordinance No. 1, Sec. 7, has accepted these lands for the purposes specified, and by legislation has provided for the erection of a capitol, exclusively out of the moneys from the fund to be created by the disposition of the lands so granted by congress. The state is an agent to carry out the objects of the donation. The fund created by the statute is a trust fund established by law in pursuance of the act of congress. * * * The state officers have no control over it, except to carry out the trust relation; and the treasurer is merely an agent for receiving and disbursing the fund under the act of congress, and in manner provided by the law of the

state. So, too, the auditor is but one of the agents or sub-agents designated by the law of the state in the execution of the trust. All this seems very clear to us in the law."

Here we have a decision by the supreme court of the state that congress intended that the proceeds of the lands granted for public buildings at the capital should be used for the purpose of erecting such buildings.

The school of mines is, beyond controversy, an educational institution. When section 17 is considered solely with reference to the grant for the establishment and maintenance of a school of mines, it would read: "There is granted to the state of Montana for the establishment and maintenance of a school of mines 100,000 acres," and the land so granted "shall be held, appropriated and disposed of exclusively" for the purpose of the establishment and maintenance of such school of mines in such manner as the legislature of said state may provide. Notwithstanding this plain and unmistakable language, the supreme court of the state holds that, by virtue of section 12 of article XI of the Constitution, the proceeds received from the sale of the lands granted for the different educational institutions can not be used for any purpose except that of investment, and the interest obtained from the investment of such proceeds, together with the rents from the lands not sold, can be used only to maintain and perpetuate such institutions, and that there is no conflict between the Constitution of the state and the Enabling Act. Such court, by so holding, has failed to give any force or effect whatever to the word "establish," used in defining the purpose of congress in making the grant mentioned.

By section 17 lands are granted to the state "for the

establishment and maintenance of a school of mines * * * ; for the state normal schools * * * ; for agricultural colleges." The sentence containing the grants for the different educational institutions referred to is an elliptical sentence. It is clearly to be inferred that the grant for a state normal school is for the *establishment* and maintenance of such institution. The rules of grammar will not admit of any other construction of the language used. Grants are also made "for the establishment of a state reform school," and "for the establishment of a deaf and dumb asylum." The school of mines, the normal school and the agricultural college are educational institutions, the reform school is a reformatory institution, and the deaf and dumb asylum is a charitable institution. We find that in section 17 reference is made to educational, charitable, penal and reformatory institutions. It is evident that congress intended to provide for both the establishment and maintenance of the educational institutions, and intended to provide for only the establishment of the other institutions. The provision for both the establishment and maintenance of the educational institutions is in keeping with the general policy of the federal government to promote education. On the other hand, there is no reason why the charitable, penal and reformatory institutions should not be maintained at the expense of the state. The intention of congress to make provision for both the establishment and maintenance of the educational institutions and to provide for only the establishment of a reform school and a deaf and dumb asylum, is evidenced by the quantity of land granted for these respective institutions. One hundred thousand acres is granted for a normal school, and only fifty thousand acres for the reform school. It was evidently contem-

plated that one hundred thousand acres would be sufficient to provide for the establishment and maintenance of a normal school. The same is true with reference to the school of mines and the agricultural college.

No reason whatever can be assigned why congress should have granted one hundred thousand acres for the *establishment* and *maintenance* of a school of mines, and the same amount of land for the *maintenance* and *perpetuation* of a normal school. On the contrary, the same reason which impelled congress to provide for the establishment of a school of mines, demanded a provision for the establishment of a normal school.

In the Constitution of the United States, as well as in the legislation by congress, the word "establish" is often used, and has uniformly been used in the sense which we claim for it. The Constitution of the United States authorizes congress to "establish post offices and post roads." It is pursuant to this power that the post office building in Helena, and all other post office buildings throughout the United States, were constructed. Pursuant to the same power congress has constructed railways, turnpikes and other roads. In the act of Feb. 18, 1881, which was amended by section 14 of the Enabling Act, it was provided that:

> "No part of such fund shall be expended for university buildings, or the salary of professors or teachers, until the same shall amount to $50,000, and then only shall the interest on said funds be used for either of the foregoing purposes, until the said fund shall amount to $100,000 when any excess, and the interest thereof, may be used for the proper establishment and support respectively of said universities."

This provision clearly authorizes the use of the excess

over $100,000 for the erection of buildings, and instead of saying that such excess may be used for the erection of buildings, it is said that the same may be used for the "establishment" of universities.

Mr. Story, in his work on the Constitution, in section 1139, says:

> "But, passing by considerations of this nature, why does not the power to establish post offices and post roads include the power to make and construct them, when wanted, as well as the power to establish a navy hospital, or a custom house, a power to make and construct them? The latter is not doubted by any persons; why, then, is the former? In each case, the sense of the ruling term 'establish' would seem to be the same; in each, the power may be carried into effect by means short of constructing or purchasing the things authorized. A temporary use of a suitable site or buildings may possibly be obtained, with or without hire. Besides, why not congress purchase or erect a post office building, and buy the necessary land, if it be, in their judgment, advisable? Can there be a just doubt that a power to establish post offices includes this power, just as much as a power to establish custom houses would be to build the latter? Would it not be a strange construction to say, that the abstract office might be created, but not the officina, or place, where it could be exercised? There are many places peculiarly fit for local post offices, where no suitable building might be found. And, if a power to construct post office buildings exists, where is the restraint upon constructing roads?"

Section 17 provides that "the lands granted by *this section* shall be held, appropriated and disposed of exclusively for the purposes herein mentioned." One of the purposes is to establish certain institutions. Section 17, as

construed by the supreme court, is nugatory to the extent that the section provides for the establishment of educational institutions.

The supreme court of the state, by virtue of the construction it places upon section 12 of article XI of the Constitution, and in holding that there is no conflict between said section of the Constitution and section 17 of the Enabling Act, necessarily decided that it was the intention of congress in making grants for the different educational institutions that the lands granted should be sold and that the proceeds should be placed in permanent funds, and used for no purpose except that of investment.

By section 11 of the Enabling Act provision is made for the creation of a "permanent school fund." By section 13 provision is made for the creation of a "permanent fund," consisting of five per cent of the proceeds of the sale of the public lands within the states. By section 14 provision is made for the creation of a "permanent fund" arising from the sale of lands granted by that section. By section 16, when taken in connection with the act of congress of July 2, 1862, therein referred to, provision is made for the creation of a "perpetual fund" by the sale of the lands granted by that section. In section 17 nothing whatever is said with reference to the creation of any fund, but the lands themselves are appropriated for the purposes stated. The grant in section 17 is made in lieu of the grant for internal improvement and the grants of swamp lands and saline lands, and is made in the same terms as the original grants, so far as any limitation upon the right to use the proceeds is concerned. In view of the fact that congress, by the same act, had provided for the creation of funds, the interest only of which could be used, if it was the intent that the proceeds of the lands granted by sec-

tion 17 should also constitute permanent funds, it is reasonable to suppose that congress would have so provided.

It is manifest that it was the intention of congress to grant the lands mentioned in sections 10 and 14 and the acts referred to in section 16, for the purpose of creating the funds therein provided for. It is also clear that by the grant contained in section 17 it was intended that the lands themselves should be "appropriated" for the purposes therein specified, instead of being used to establish funds, the interest and income only of which should be applied to such purposes.

Webster defines the word "appropriate" as follows:

> "To set apart for, or assign to, a particular person or use, in exclusion of all others; as a spot of ground is appropriated for a garden; to appropriate money for the increase of the navy."

The intent of congress with reference to the lands granted by section 17 is clearly manifest, when the act of July 2, 1862, donating lands to the state for colleges for the benefit of agriculture and the mechanic arts, referred to in section 16 of the Enabling Act, is considered. By the act of 1862 it was provided that the proceeds arising from the sale of the lands granted should constitute a perpetual fund, the principal of which should remain forever undiminished, and the interest of which should be inviolably appropriated by each state to the endowment, support and maintenance of at least one college. If congress had intended that the grant of fifty thousand acres of land to each state for an agricultural college by section 17 should stand on the same basis as the grant made by

section 16, it certainly would not have included any grant for an agricultural college in section 17, and made the same provision with reference thereto that it did with reference to lands granted for public buildings at the capitals of the states. The only reasonable explanation of the two grants for agricultural colleges is that the one contained in section 17 was for the purpose of establishing an agricultural college, and that section 17 intends and contemplates the use of the proceeds received from the sale of lands.

When it was declared that the lands should be appropriated, it certainly was not meant that the rent derived from leasing the lands, and the interest received from an investment of the proceeds of the lands sold should be appropriated. The lands are granted to the state, and the same lands are required to be appropriated for certain purposes. No one could be found who would say that congress did not intend to grant the lands, but only the rent which might be derived from leasing the lands and the interest which might be obtained from the investment of the proceeds of the lands sold. It would seem to me that there is as much reason for saying that the lands were not granted as there is for saying that congress did not intend that the lands should be appropriated. In section 20 we find the word "appropriated" is used. In that section it is provided "that the sum of $20,000, or so much thereof as may be necessary, is hereby appropriated * * * for defraying the expenses" of the constitutional convention. Here the meaning of the word "appropriated," as used in the Enabling Act, is clearly shown.

In the opinion of the supreme court of the state it is said:

"Under the provisions of section 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not control the funds derived from sales or leases except in conformity with the constitutional provisions of section 12 of article XI, above."

Notwithstanding section 17 declares that the lands shall be *appropriated* for the purposes for which the grants are made, the state court says that the legislature has to do only with the "management and disposition of the lands themselves," and the right to control the funds received from sales and leases can not be exercised except in conformity with the Constitution. It follows that no significance whatever is attached to the language of the Enabling Act conferring power upon the legislature to appropriate the lands.

* * * * *

Section 11 of the Enabling Act reads as follows:

"That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five ears, in quantities not exceeding one section to any one person or company; anl such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

It was contended in behalf of the defendant in error in the lower court that the expression "all lands herein granted for educational purposes" contained in section 11, includes the lands mentioned in section 17. The supreme court of the state held otherwise.

As this court is now called upon to construe section 17, the question as to the lands referred to in section 11 is open for consideration, notwithstanding the decision of the supreme court of the state with reference thereto.

In discussing this question attention is first directed to the following provision of section 11:

> "* * * *and such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."*

The words "such lands" necessarily refer to the lands mentioned in the first line of the section.

Section 10 of the Enabling Act reads as follows:

> "That upon the admission of each of said states into the union sections numbered sixteen and thirty-six in every township of said proposed states, and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states *for the support of common schools*, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the secretary of the interior; *Provided*, that the sixteenth and thirty-sixth sections embraced in

permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

The grant contained in section 10 is a grant *in praesenti*. When the states were admitted into the union the title to sections 16 and 36 passed, whether the same were surveyed or unsurveyed.

Schulenburg v. Harriman, 21 Wall. 44.
Beecher v. Weatherby, 95 U. S. 517.
Sherman v. Buck, 45 Cal. 656.
Daggett v. Bonewitz, 7 N. E. 900.

Section 19 of the Enabling Act provides:

"That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective states entitled thereto."

Section 17 contains a grant of lands "in quantity," and by virtue of the provisions of section 19, the title to such lands could not pass until after there had been a selection, and such selection could not be made until after the lands had been surveyed, and could then be made from such lands only as had not been reserved or appropriated.

Mc[illegible]e v. Donahue, 142 U. S. 587.
Pa[illegible]rson v. Tatum, Fed. Cas. No. 10830.
Te[illegible] v. Megerle, 24 Cal. 619.

We hav[illegible] then, a grant by section 19 of specific lands, the title t[illegible] which passed to the states upon their admission into the u[illegible]on, whether such lands at that time were surveyed or [illegible]surveyed. On the other hand, section 17 did not grant [illegible]the title to any particular lands, but merely vested th[illegible]right to a specific quantity to be afterwards selected.

In viev[illegible] of these considerations, we are irresistably forced to [illegible]he conclusion that the lands referred to in section 11 a[illegible] the specific lands granted by section 10. Any other con[illegible]truction would lead to absurd results. As the lands gra[illegible]ted in section 17 are granted in quantity, there could be [illegible]o reservation of these lands except by reserving all of the [illegible]public lands in the states mentioned in the act. Congress [illegible]ould not have intended such a reservation. This is shown [illegible]ot only by section 19, but by section 4, wherein it is mad[illegible] a condition to the admission of the states that they shou[illegible]d disclaim all rights and title to the unappropriated pub[illegible]c lands.

In the [illegible]case of Foley v. Harrison, 15 How. 444, a construction [illegible]of the act approved Sept. 4, 1841, granting lands for inter[illegible]al improvement, was involved. The court in the opin[illegible]n said:

> "[illegible]t could not have been the intention of the government to relinquish the exercise of power over the public lands that might be located by the state. The same system was to be observed in the entry of lands by the state as by individuals, except the payment of

the money; and this was necessary to give effect to the act, and to prevent conflicting entries."

The only construction of section 11 that is reasonable and in harmony with section 19, is that the lands referred to therein are the lands granted by section 10. Section 11 necessarily relates to a specific grant, whereas section 19 expressly declares that the lands therein referred to are the lands granted "in quantity" and "as indemnity."

In section 17 congress granted to South Dakota "for such other educational and charitable purposes as the legislature of said state may determine, 170,000 acres," and made a like grant for the same purposes to North Dakota. To Washington congress, by that section, granted "for state charitable, educational, penal and reformatory institutions 200,000 acres." The section then provided that the lands should be held, appropriated and disposed of for the purposes mentioned, in such manner as the legislatures of the respective states might severally provide. According to the terms of the section the legislature of each of said states may divide or apportion these lands among the several institutions for the various purposes named, as it chooses. If section 11 applies to the lands granted by section 17, we then have a reservation in section 11 which not only applies to the lands granted for the particular institutions named, but we also have a reservation which will operate upon lands granted for charitable, educational, penal and reformatory purposes. This grant to North Dakota, South Dakota and Washington, to which we have called attention, shows clearly that the reservation contained in section 11, and, in fact, the entire section, never was intended to apply to any lands granted by section 17.

To give section 11 the application contended for by the

attorney general would be, in effect, to repeal and abolish the homestead laws in at least seven states of this northwest country.

The grant contained in section 17 is for the purpose of *establishing*, as well as *maintaining*, the different institutions of learning therein mentioned. It is expressly declared that the "lands granted by *this section* shall be held, appropriated and disposed of exclusively for the purposes herein mentioned." The proceeds of the lands referred to in section 11 must be placed in a fund, the interest of which is required to be expended "in support of *said* schools." It may be that the word "support" is synonymus with "maintain," but no one would contend that it has the same meaning as the word "establish."

If section 11 prohibits the use of the proceeds of the lands granted by section 17, and only permits the expenditure of the interest and income of such proceeds the provision of section 17 that the lands granted by that section shall be held, appropriated and disposed of exclusively for the purposes therein mentioned, is nugatory.

The grant made by section 10 is "for the support of common schools." Section 11 requires that the interest of the permanent fund therein provided for "shall be expended in the support of said schools." The only schools to which the word "said" can refer are the common schools mentioned in section 10. As it could not have been intended by congress that the interest on the proceeds of the lands granted by section 17 should be used for the support of the "common schools," the lands mentioned in section 11 must necessarily be the lands granted by section 10. In section 11 the price at which the lands therein referred to may be sold is fixed at not less than ten dollars per acre, and it is provided that "said lands may, under such regulations as

the legislature shall prescribe, be leased for periods of not more than five years in quantities not exceeding one section to any one person or company." In section 14 it is provided:

> "None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section 11 of this act."

If section 11 applied to all lands granted by the act, then there was no necessity whatever for the provision quoted from section 14. In section 14 it is provided that the proceeds derived from the sale of the lands therein granted "shall constitute a permanent fund * * * and the income thereof to be used exclusively for university purposes." If section 11 is to receive the construction contended for by defendant in error, then the provision just quoted from section 14 is superfluous. In section 14 reference is made to "schools, colleges and universities," and the expression "university purposes" is used. It thus appears that the words "colleges" and "universities" are used as distinguishing terms, and that the word "schools," used in section 11, was not intended to embrace colleges and universities.

It is apparent that the framers of the Constitution understood the words "school fund," as used in section 11, to apply to the grant by section 10, for the support of common schools. In sections 2, 3 and 5 of article XI of the Constitution, the words "school fund" are used, whereas in section 11 of the same article reference is made to "the funds of the state university," clearly showing that the framers of the Constitution regarded the state university fund as different and distinct from the school fund.

It is a significant fact that authority is granted by section 17 to legislatures of the several states, to which the Enabling Act applies, to hold, appropriate and dispose of the lands by such section granted in such manner as the legislatures may prescribe, whereas, by section 11 it is provided that the sale must be at public sale, the price must not be less than ten dollars per acre, and in the event the lands be leased they shall not be leased for a term longer than five years and in quantities not exceeding one section to one person or company. If section 11 refers to the lands mentioned in section 17, then the provision conferring discretion upon the legislatures as to the manner of holding, appropriating and disposing of such lands is meaningless.

It is a rule of construction of statutes that a specific intent will control as against a general intent. In view of this rule, even though section 11 was intended to apply to all lands granted by the act, it can not control the specific intent declared in section 17, that the purposes of the grant made by that section are to establish and maintain state normal schools and other institutions, and that the lands granted shall be held, appropriated and disposed of exclusively for such purposes, in such manner as the legislature may provide. Furthermore, where there is an irreconcilable conflict between different parts of the same act, the last in order of position must control.

As already stated, the only reasonable explanation of the two grants for agricultural colleges, the one contained in section 16, and the other contained in section 17, is that the grant contained in section 17 was for the purpose of establishing and maintaining an agricultural college, and congress, in making such grant, intended and contemplated that the proceeds derived from the sale of the lands granted should be used for such purpose; whereas, the grant con-

tained in section 16 was for the purpose of establishing a perpetual fund, the capital of which should remain forever undiminished, and the interest of which should be applied to the use and support of such college.

When section 11 is read and considered in connection with the other provisions of the act, it is manifest that the word "herein," appearing in the first line of the section, was erroneously used. The proper word would have been "hereinbefore," or the word "therein." It may be that the original draft of the bill incorporated sections 10 and 11 as one section, and afterwards the act was differently sectionized without changing the language used to conform thereto.

Again, if it was intended that section 11 should embrace all lands granted by the act, the more appropriate place for such section in the act was after the sections containing the different grants. The fact that it immediately follows section 10 is significant.

Thus far we have proceeded upon the assumption that section 17 contains a grant of lands. Notwithstanding the language of the section, it is not a grant of lands, but is merely a grant of a right to select lands and thereafter acquire the title thereto. As said by Circuit Justice Field in the case of Patterson v. Tatum, Fed. Cas. No. 10830, in speaking of the grant for internal improvement by the act of 1841, "it only vests an immediate right to a specific quantity to be afterwards selected under direction of the state." By virtue of the provisions of section 19 the right to make the selection only applies to surveyed public lands, and then only to such surveyed public lands as are not at the time of the selection reserved or otherwise appropriated. On the other hand, section 10 contains a grant of the lands, and is the only section of the act in which the

title to lands is granted, as distinguished from a right afterwards to select lands and obtain title thereto. When, therefore, the expression "all lands herein granted" was used in section 11, congress may have had in view the distinction pointed out.

In considering section 17 independently of section 11 it clearly appears that it was the intention of congress to provide for the establishment, as well as the maintenance, of the educational institutions referred to in such section, by authorizing the legislature to appropriate the lands granted, or the proceeds thereof, to such purpose, instead of creating funds, the interest and income of which should be used to maintain and perpetuate such institutions. The intent so clearly expressed in section 17 absolutely forbids any construction of the Enabling Act which would include the lands granted by section 17, within the class of lands referred to in section 11.

The fundamental rule in construing statutes is to ascertain the intention of the law-making power and to give effect to such intent, even though it does not conform to the letter of the statute.

In the case of Church of the Holy Trinity v. United States, 143, U. S. 457, the court said:

> "It is a familiar rule that a thing may be within the the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of a general meaning are used in a statute, words broad enough to include an act in question, and yet a con-

sideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

In the case of Heydenfeldt v. Daney Mining Co., 93 U. S. 634, in which the court, construed the 7th section of the Nevada Enabling Act, granting sections 16 and 36 for common school purposes, it is said:

> "It is true that there are words of present grant in this law; but in construing it, we are not to look at any single phrase in it; but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Judge Sharswood, 'to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.' Gyger's Estate, 65 Pa. St. 312. *If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.* With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration." (The italics are mine.)

In view of the rule that the intention and spirit of a law must prevail over its letter, the expression, "all lands herein granted," found in section 10, must yield to the clear intent of congress that the lands referred to were only the lands granted by section 10.

The cases of State v. Maynard, 71 Pac. 775, State v.

McMillan, 96 N. W. 310, and Roach v. Gooding, 81 Pac. 642, were cited in the lower court as supporting the position of defendant in error that section 11 applies to the lands granted by section 17. Each of these cases holds that the expression, "all lands herein granted for educational purposes," appearing in the first line of section 11 of the Enabling Act, applies to all lands granted by the act. The first of these cases decided was that of State v. Maynard. This case involved the question of the right to use the proceeds of lands granted to the state of Washington by section 17 of the Enabling Act for a state normal school, for the erection of a state normal school building. It would seem from the report of the case contained in the Pacific Reporter, that the relator was not represented by an attorney. The opinion assumes, without serious consideration, that the provisions of section 11 of the Enabling Act apply to all lands granted by the act. The next case decided was that of State v. McMillan. This case involved the question of the right to the use of the proceeds of the lands granted to the state of North Dakota for a normal school. The construction of the Enabling Act adopted by the supreme court of the state of Washington is followed, but the decision is based principally upon the provisions of the Constitution of the state referred to in the opinion. These provisions are entirely different from the provisions of section 12 of article XI of the Constitution of Montana. The last case decided was that of Roach v. Gooding. This case follows the construction of the Enabling Act adopted by the supreme court of Washington and the supreme court of North Dakota. The case involved the grant made by section 14 for university purposes.

It would seem from reading the opinions in these cases

that neither of them received the serious reflection and consideration which the importance of the question involved deserved. In the opinion in each case it is assumed that the words "all lands herein granted" were intended to refer to all lands granted by the act, and the letter of the statute is followed without any attempt to discover the spirit and intent by an analysis of the entire act. The many reasons which I assign in support of my contention are not discussed or even alluded to. I submit that these cases are entitled to little weight as authority. The supreme court of Montana held that section 11 does not apply to the lands granted by section 17.

In concluding this branch of the case I respectfully submit that, by section 17 of the Enabling Act, there was granted to the state of Montana one hundred thousand acres of land for the purpose of establishing, as well as maintaining, a state normal school, and that there was conferred upon the legislature of the state the authority to appropriate such lands to the purpose for which the grant was made. I further respectfully submit that the erection of buildings for a state normal school is the establishment of such school, within the meaning of the word "establishment" as used in the Enabling Act, and that the authority to appropriate the lands to the purpose of the grant authorized the application of the proceeds received from the sale of the lands to the erection of such buildings.

The supreme court of the state, by its decision, denied the authority of the legislature to appropriate for a state normal school the lands granted therefor. The decision thus made is based upon the provisions of section 12 of article XI of the Constitution of the state.

Does the Enabling Act or the state Constitution control?

By the Constitution of the United States there is granted to congress all the powers therein enumerated. To the extent of this grant the people have divested themselves of the attributes of sovereignty. A law is but the expression of the will of the sovereign power. It is impossible, therefore, for any law of a state, whether found in the Constitution or in a statute, to conflict with the Constitution of the United States, or any act of congress made in pursuance thereof. If a provision of a constitution or a statute of a state is inconsistent with the Constitution of the United States, or an act of congress, it is not law. The proposition thus stated is embodied in the VIth article of the Constitution of the United States, which declares:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; *and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*"

In section 3 of article IV of the Constitution of the United States it is provided:

> "The congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

Pursuant to this authority, the grants contained in the Enabling Act were made. These grants are laws, and if section 12 of article XI of the Constitution of Montana is

inconsistent therewith it must yield to the act of congress making said grants, which is the supreme law of the land.

When congress, by section 17 of the Enabling Act, provided that the lands granted by that section should be held, appropriated and disposed of in such manner as the legislatures of the respective states should severally provide, it created the legislatures of the several states the agents to carry out and perform the trust which was imposed upon the states by the grant made. This it had the right to do by virtue of the power conferred by the Constitution of the United States with reference to the territory and property of the United States. Congress might have designated the governor, or any other officer of the state, or any officer of the United States, as the agent to hold, appropriate and dispose of the lands granted by section 17, for the purposes therein named. If an officer of the United States had been named, for instance, the secretary of the interior, no one would be found to assert that that authority granted to him by an act of congress could be controlled by the Constitution of the state. The mere circumstance that the legislature of the state has been designated can not change the law with reference to the authority granted. By virtue of the authority thus conferred upon the legislature it was beyond the power of the people of the state, in the Constitution, to control in any manner the legislature with reference to the holding, appropriation and disposal of such lands.

The supreme court of the state in its opinion said:

"The lands were granted to the state of Montana—not to the legislative assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the

> state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for normal school purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its legislative assembly."

The language of the Enabling Act is that there is granted to the state of Montana "for state normal schools, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for state normal schools in such manner as the legislature of the state may provide. It is true that the grant is to the state, but, as declared in section 1 of article XVII of the Constitution, the lands "shall be held in trust for the people, to be disposed of as hereinafter provided," for the purpose for which they have been granted. The state received the title in trust for the people, who are the beneficiaries. It is not the state to which power is granted to determine the manner in which the lands shall be held, appropriated and disposed of, but such power is conferred upon the legislature of the state. There is a clear distinction between the state and the legislature of the state. In the case of Poindexter v. Greenhow, 114 U. S. 270, it is said:

> "The state is a political corporate body, can act only through its agents, and can command only by laws."

In speaking of the distinction between the government

of a state and the state itself, this court in the same case says:

> "In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation. The Constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof."

It would seem that the lower court has, in its opinion, confounded the legislature of the state with the state itself. As already stated, the grant was made to the state in trust for the people, and it was declared that the trust should be executed by the legislature, not by the state. The legislature is a branch of the state government, and, as said in the opinion in the case of Poindexter v. Greenhow, supra, "both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof." When, therefore, congress declared that the lands granted should be held, appropriated and disposed of for the purposes for which they were granted, in such manner as the legislature of the state might provide, it did not mean to confer power upon the state, but it was clearly the intention to grant the power to the legislature, as distinguished from the state.

By no rule of statutory construction can the word "legislature" be said to mean "state."

I therefore submit that the Enabling Act controls.

Did the acceptance of the grant contained in section 17 of the Enabling Act create a contract, and does section 12 of article XI of the Constitution, as construed by the supreme court of the state, impair the obligation of such contract?

The 7th section of Ordinance No. 1, adopted by the constitutional convention of Montana, provides:

> "The state hereby accepts the several grants of land from the United States to the state of Montana, mentioned in an act of congress, entitled 'An Act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington, to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states.' Approved February 22d, 1889, *upon the terms and conditions therein provided.*"

In the case of McGehee v. Mathis, 4 Wall. 143, the court said:

> "It is not doubted that the grant by the United States to the state upon conditions, and the acceptance of the grant by the state, constituted a contract. All of the elements of a contract met in the transaction—competent parties, proper subject matter, sufficient consideration, and consent of minds. This contract was binding upon the state, and could not be violated

by its legislation without infringement of the Constitution.

> "The contract required the state to appropriate the lands granted, to the purpose of reclaiming them. The lands themselves might be conveyed to the levee contractors for the work performed, or the contractors might be paid in money or in scrip representing land. If the state, therefore, after acceptance of the grant, and without applying the lands or their proceeds in money or scrip to the purpose of reclamation, had sought, by means of taxation, to compel purchasers to pay for the levees and drains necessary to reclaim their land, it would certainly be difficult to say that the contract was not violated."

In the case of Missouri, etc. Ry. Co. v. Railway Co., 97 U. S. 491, the court said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress."

Inthe case of Schulenberg v. Harriman, 21 Wall. 44, the court, in speaking of a grant of lands by the United States to the state of Wisconsin, said:

> "A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires."

By section 7 of Ordinance No. 1, relating to federal relations, the constitutional convention accepted the grants made by the Enabling Act "upon the terms and conditions therein provided." This acceptance created the contract.

It follows that as section 12 of article XI of the Constitution, which did not become operative until ratified at the election held on the first Tuesday of October, 1889, is inconsistent with the contract resulting from the acceptance of the grants made by section 17 of the Enabling Act, such section is a nullity by virtue of the contract clause of the Constitution of the United States.

In the case of Gunn v. Barry, 15 Wall. 10, the court said:

> "A state can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the national constitution."

* * * * *

It can not be seriously claimed that by the admission of Montana into the union the provisions of section 12 of article XI of the Constitution of Montana, if inconsistent with the Enabling Act, were assented to by congress, because the admission took place by virtue of a proclamation of the president in accordance with section 8 of the Enabling Act. In that section it was provided that

> "* * * if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the president of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by congress into the

union under and by virtue of this act on an equal footing with the original states from and after the date of said proclamation."

No authority was conferred upon the president to determine whether or not the Constitution of Montana, in any of its provisions, conflicted with the Constitution of the United States, or with any act of congress, and there was no necessity for such authority, because if there were any such provisions they could have no force or validity whatever. It can not be contended with any degree of reason that a proclamation of the president could have the effect of repealing, modifying or amending an act of congress.

Respectfully submitted.

M. S. GUNN,
Attorney for Plaintiff in Error.

APPENDIX.

An Act to enable the Normal School Land Grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College.

Be it Enacted by the Legislative Assembly of the State of Montana:

Section 1.

The State Board of Land Commissioners of the State of Montana is hereby authorized and directed to issue coupon Bonds to the amount of Seventy-five Thousand (75,000) dollars. The Denomination of said bonds shall be One Thousand (1000) dollars each, and they shall be known as the State Normal Bonds of 1905. Said Bonds shall become due in Twenty years from the date of issue and be payable, at the option of the State, in ten years from their date. Said Bonds shall bear interest at a rate of not more than five per cent per annum, payable semi-annually, on the first days of May and November in each year, at the office of the State Treasurer of the State of Montana. Said Bonds shall run from the State Board of Land Commissioners of the State of Montana, to bearer, and shall be signed by the State Board of Land Commissioners, and countersigned by the Secretary of State who shall attach his seal thereto. Provided, however, that nothing in this Act shall be so construed as to hold the State of Montana liable for the payment of said Bonds or the interest thereon.

Section 2.

Each Bond issued under the provisions of this Act shall contain a condition substantially as follows:

"This Bond is one of a series of seventy-five Bonds of the denomination of One Thousand (1000) dollars each, of like tenor and date, and numbered from one to seventy-five inclusive, and aggregating the sum of Seventy-five Thousand (75,000) dollars. The right is hereby reserved to redeem this Bond at any regular interest period as stated herein, on and after three years from its date, by the payment of the principal and interest in full to date of redemption, and a premium upon the face value of the Bond of five per cent. Provided, that not less than sixty days notice shall be given by the State Treasurer of such intention to redeem by publication in not less than one newspaper published in the City of New York, and one newspaper published in the City of Helena, Montana; and provided further that such redemption shall be made by serial number, beginning with the bond bearing the lowest number then outstanding.

Section 3.

Said Bonds shall bear date of May 1st, 1905, and shall be issued and sold as soon as possible after the passage of this act.

Section 4.

All funds realized from the sale, or of the leasing of the lands, and licenses to cut trees thereon, (being One Hundred Thousand Acres) granted by the United States to the State of Montana for the establishment and main-

tenance of a State Normal School, under and by virtue of the provisions of Section 17 of the Act of Congress, approved February 22nd, 1889, entitled An Act to provide for the Division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington to form State Governments, and to be admitted into the union on an equal footing with the original States, and to make donations of public lands to such States" except such sums as may be necessary for the payment of the bonds heretofore issued against such funds, and the interest thereon, are hereby pledged as security for the payment of the principal and interest of the Bonds issued and authorized by this Act, and all moneys and revenues received from said Lands or any of them, whether on account of sales of lands, or of leases or sales of timber therefrom, or otherwise, (excepting such moneys as may be necessary for the payment of the principal and interest on Bonds heretofore issued, as above referred to) are hereby set apart and shall continue as a separate fund for the payment of the principal and interest of the Bonds issued by reason hereof as hereinafter provided.

Section 5.

It shall be the duty of the State Treasurer to keep all moneys derived from the sale, leases or sale of timber from the State Normal School Lands, as hereinbefore mentioned, in a separate fund, to be known and designated as "The State Normal School Fund" and out of the moneys in such fund, he shall pay, after the approval of the State Board of Examiners.

1st.

All sums due as principal or interest on the Bonds heretofore issued and referred to in Section 3 of this Act.

2nd.

The cost and expenses of issuing and selling the Bonds authorized by this Act.

3rd.

The interest on the Bonds herein authorized, when due; and

4th.

When such bonds shall become due or payable, he shall call in and pay the same as rapidly as the money in such fund will admit, after providing for the interest on same. In the event that there shall not be sufficient money in the said fund to pay the interest when due, the State Board of Examiners shall, by order entered on its minutes, cause warrants to be issued on the said fund for the amount of interest then due, and the warrants so issued shall bear interest at the rate of five (5) per cent per annum; said warrants shall be paid by the State Treasurer as soon as sufficient money accumulates in said fund applicable thereto to pay the same, and by reason of the delivery of said warrants to the holders of said Bonds in satisfaction of accrued interest there shall be no default thereof.

Section 6.

It shall be the duty of the State Treasurer to give notice by advertising for not less than two insertions, in one newspaper published in the City of Helena, Montana, and

one newspaper published in the City of New York, that he will, on the first day of April, 1905, sell the Seventy-five thousand (75,000) dollars of bonds hereby authorized, and will receive bids therefor, and said bonds shall on said day be sold to the highest bidder, or to the person offering to take the same at the lowest rate of interest, as may be directed by the State Board of Land Commissioners. If no bids are then received, or if none are accepted, said Bonds may be thereafter sold at private sale: Provided, that the State Board of Land Commissioners shall receive and open all bids and accept or reject the same, as it may deem for the best interests of the State; and provided further, that said bonds shall not be sold for less than par.

Section 7.

The moneys derived from the sale of said Bonds shall be used to erect, furnish and equip an addition to the present State Normal School Building, at Dillon, Montana, and shall be paid out for such purpose by the State Treasurer upon vouchers approved by the Executive Board of the State Normal School, and allowed and ordered paid by the State Board of Examiners.

Section 8.

The erection and equipment of said building shall be under the control of said Executive Board, but all plans, specifications and contracts shall be subject to approval by the State oBard of Education before the same shall become valid and binding.

Section 9.

This Act shall be in full force and effect from and after its passage and approval by the Governor.

Approved Feb'y. 2nd, 1905.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 693. 252.

THE STATE OF MONTANA EX REL. CHARLES S. HAIRE, PLAINTIFF IN ERROR,

vs.

JAMES H. RICE, AS STATE TREASURER, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

M. S. GUNN,
Attorney for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24633

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REPLY BRIEF OF PLAINTIFF IN ERROR.

It is contended for defendant in error that no federal question is involved in this case, by reason of which this court is without jurisdiction to review the judgment of the Supreme Court of the State of Montana.

Federal Questions.

Section 3 of Article IV of the Constitution of the United States provides:

> "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

By virtue of this provision of the Constitution of the United States, Congress had the power to make the grant con-

tained in section 17 of the Enabling Act, and to provide therein that "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide."

Gibson *vs.* Choteau, 13 Wall., 92.
Butte City Water Co. *vs.* Becker, 196 U. S., 119.
Irvin *vs.* Marshall, 20 Howard, 538.

In the opinion in the case of Missouri, etc., Ry. Co. *vs.* Railway Co., 97 U. S., 491, it is said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress."

The Grant Regarded as a Law.

Section 17 of the Enabling Act contains a grant to the State of Montana for the purpose of *establishing* as well as maintaining a State normal school, and conferred authority upon the Legislative Assembly of Montana to pass the act approved February 2, 1905. In holding this act invalid, the Supreme Court of the State decided against the validity of the authority which it is claimed for plaintiff in error was conferred upon the Legislative Assembly of Montana by said section 17.

Again, it is claimed for plaintiff in error that section 12 of Article XI of the State Constitution, as construed by the Supreme Court of the State, is in conflict with section 17 of the Enabling Act, and is invalid. The decision of the Supreme Court of the State was in favor of the validity of this provision of the State Constitution.

The Grant Regarded as a Contract.

It is further claimed for plaintiff in error that the grant contained in section 17, when accepted by the constitutional convention of Montana, resulted in a contract, and that section 12 of Article XI of the Constitution of the State, as construed by the Supreme Court of Montana, violates the obligation of such contract.

The authorities sustaining the proposition that a contract was created by the acceptance of the grant are cited on pages 36, 37, and 38 of the brief for plaintiff in error heretofore filed.

The contract was complete when the grant was accepted by the Constitutional Convention. The Constitution did not go into effect until the admission of Montana into the Union. The adoption of the Constitution and the admission of Montana into the Union were in the nature of conditions subsequent.

If, however, it should be held that the acceptance of the grant by the Constitutional Convention was inoperative until the Constitution went into effect, and that the seventh section of said Ordinance No. 1 should be construed in connection with the Constitution, then the construction of section 12 of Article XI of the State Constitution by the Supreme Court of the State is not controlling in this court.

When a right is asserted by virtue of an alleged contract with the United States, this court will for itself determine the existence and the terms and conditions of the contract. It follows that if the existence and the terms and conditions of the contract in question are to be determined by a consideration of section 12 of Article XI of the State Constitution, as well as the seventh section of the Ordinance adopted by the Constitutional Convention accepting the grants made to Montana by the Enabling Act, this court should construe said section of the Constitution of Montana, and the construction placed thereon by the Supreme Court of the State is not controlling.

Construction of Section 12 of Article XI of the State Constitution.

Section 12 of Article XI of the Constitution of the State provides:

> "The funds of the State university and of all other State institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the State against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

The preamble to the Constitution of Montana reads as follows:

> "We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a State government, do, in accordance with the provisions of the enabling act of Congress, approved the 22nd of February, A. D. 1889, ordain and establish this Constitution."

Section 1 of Article XVII of the Constitution provides:

> "All lands of the State that have been, or that may hereafter be granted to the State by Congress, and all lands acquired by gift or grant or device, from any person or corporation, shall be public lands of the State, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised."

When the preamble to the Constitution and section 1 of Article XVII are considered in connection with the seventh

section of Ordinance Number 1, accepting the grants made by the Enabling Act "upon the terms and conditions therein provided," it is quite apparent that the framers of the Constitution did not intend by section 12 of Article XI to require a departure from the purposes of the said grants.

Section 17 of the Enabling Act does not provide for the creation of or dedicate any fund, but it provides that the lands shall be appropriated to the purposes for which they are granted. On the other hand, section 14 provides for the creation of a "permanent fund" for the State university, by the sale of the lands granted by that section, and section 16, when taken in connection with the act of 1862, therein referred to, provides for the creation of a "perpetual fund" for an agricultural college, by the sale of the lands granted by that section. "Funds" may be created for the other institutions of learning by grants of land or donations of other property or money by private individuals, the State, or Congress.

If a person should make a gift of $100,000 to the State, to be used for the purpose of erecting an addition to the State Normal School building, this gift would not constitute a fund subject to the provisions of said section 12 of Article XI of the Constitution. If the State should make an appropriation of money for the establishment of a State normal school, the money thus appropriated would not constitute a fund to be invested as required by the provision of said section of the Constitution.

The grant of lands by Congress for the establishment of a State normal school, stands on the same basis as the gift by an individual or an appropriation by the State for a like purpose. If all moneys received for the institutions of learning, mentioned in this section of the Constitution, are subject to the provisions of said section, as the Supreme Court of the State holds, such institutions never could be legally established.

Right of Plaintiff in Error to Raise Questions Presented.

It is argued for defendant in error that if section 17 is held to contain a grant to the State of Montana for the purpose of establishing as well as maintaining a State normal school, the failure of the State to apply the grant to the establishment of such a school is a matter which concerns Congress alone. This argument assumes that the Legislative Assembly of the State has failed to appropriate the lands to the establishment of a State normal school, whereas the Legislative Assembly, by the act approved February 2, 1905, has strictly observed the purpose of the grant and exercised the authority conferred upon it by said section 17. If the Legislative Assembly of the State had provided that the proceeds received from the sale or leasing of the lands granted should be used for no other purpose than to maintain and perpetuate a normal school, then plaintiff in error would undoubtedly have no right to complain, and the authorities cited for defendant in error on page 2 of his brief would be in point. This is not a case in which the State has violated the trust imposed upon it by Congress, but, on the contrary, the Legislative Assembly of the State has strictly observed the trust imposed by section 17 of the Enabling Act.

It is contended for defendant in error that plaintiff in error has no interest which entitles him to question the impairment of the obligation of the contract created by the acceptance of the grant, or to call in question the terms and conditions of the contract.

The plaintiff in error, by virtue of the claim he holds, which is justly payable out of the proceeds received from the sale of the bonds in question, has an interest in the contract. The lands are pledged for the payment of the bonds, and the proceeds from the sale of the bonds are applicable to the payment of the claim of the plaintiff in error.

Respectfully submitted,

M. S. GUNN,
Attorney for Plaintiff in Error.

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IN THE

SUPREME COURT

OF THE UNITED STATES

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Plaintiff in Error,

vs.

JAMES H. RICE, as State Treasurer,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Assistant Attorneys General
Attorneys for Defendant in Error.

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Attorneys for Defendant in Error.

NO FEDERAL QUESTION INVOLVED.

The only question necessarily involved in this case is "Does the act of the legislative assembly of the State of Montana (Appendix, appellant's brief, p. 40), conflict with the constitution of the State of Montana?" This is not a federal question.

The only federal question that *can* be involved is as to whether or not the State of Montana is violating, or has violated, a trust imposed upon it, or reposed in it, by the act of Congress of February 22, 1889 (25 Stat. at large, 676), known as the "Enabling Act" which makes certain grants of land to the State of Montana, and this is a question that can exist only between the United States and the state, and cannot be raised by a private party.

> "It is a matter between two sovereign powers and one which private parties cannot bring into discussion."
>
> Miller Co. v. Railroad Co.'s., 107 U. S. 557; also U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 511.

The case of Kennard v. Nebraska involved the construction by the State Supreme Court of section 12 of the Enabling Act of that state (13 Stat. 197), relating to lands of Indian Reservations, and the state court held that the lands of the "Pawnee Indian Reservation" were public lands within the meaning of section 12 of the Enabling Act. The case was then brought to this court and the decision thereon is reported in 186 U. S. 304, where this court, in affirming the judgment of said court said in part:

> "There is no dispute as to the facts out of which the controversy arose. The right of the plaintiff to

recover under his contract with the state is not for us to determine, unless the record discloses that he has been deprived of some title, right, privilege or immunity secured to him by the constitution of the United States, and unless it appears that such title, right, privilege or immunity was specially set up or claimed in the state court. Oxley Stave Co. v. Butler Co., 166 U. S., page 648; Water Power Co. v. Street Rwy. Co., 172 U. S. 475."

In the case at bar there is no claim nor pretense that the plaintiff in error was guaranteed any rights, privileges or immunities by the constitution or laws of the United States, hence his right to recover, if he can recover at all, is based solely upon the state law. This court in the Kennard case, above, further said:

"But the validity of the acts of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the state court rests upon section 709 of the Revised Statutes. It has often been held that the validity of a statute or treaty of the United States is not 'drawn in question' within the meaning of section 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210; Cook County v. Calumet &c Canal Co., 138 U. S. 635, 653; Borgmeyer v. Idler, 159 U. S. 408; Blackburn v. Portland Mining Co., 175 U. S. 571; Florida Central Railroad Co. v. Bell, 176 U. S. 321, 328; Water Power Co. v. Street Ry. Co., 172 U. S. 488.

The decision by the Supreme Court of the state, that the Pawnee Reservation lands in Nebraska were public lands within the meaning of the twelfth section of the Enabling Act did not bring into question the validity of that section—much less was it a decision *against* its validity."

The plaintiff in error, therefore, cannot raise this question, and no other federal question *can* be involved.

Section 12, Article XI of the state constitution of Montana provides:

> "The funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

The Supreme Court of Montana in the concluding paragraph of the decision of this case, found on page 34 of the transcript herein, says:

> "The act of the legislature now under consideration in authorizing the expenditure of moneys received from the sale of Normal School lands, or of the timber on lands granted in aid of the state Normal School, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI of the state constitution, and is, therefore, void and of no effect; and, being so, the State Treasurer rightly refused to proceed under it and cannot be coerced by *mandamus*."

And while the court in the discussion did make some reference to the decision of the Supreme Court of the states of Washington and North Dakota and expressed

some disapproval therewith, yet the decision of the Montana court was, and is, based wholly upon a construction of the state constitution.

The construction placed upon a state statute or a state constitution by the highest tribunal of the state will be regarded as conclusive upon the federal court as to the state law.

> Williams, Treasurer, v. Eggleston, 170 U. S. 304 (at p. 311).
>
> Adams Express Co. v. Ohio, 165 U. S. 194 (at p. 219).

The construction of this state constitution is in no sense a federal question, and the court did not place any construction upon this act of Congress.

> "The rule is settled that before giving this court jurisdiction of the writ of error to a state court it must appear affirmatively, not only that the federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216; Johnson v. Risk, 137 U. S. 300. Tested by this rule this writ of error cannot be sustained."
>
> Cook County v. Calumet & Chicago Canal & Dock Co., 138 U. S. 635 (at p. 651).

If this honorable court should find and hold that the State of Montana or the legislature of Montana, under the terms of the Enabling Act was, and is, vested with the authority to convert these land grants into funds which might be used for the erection of buildings, the

purchase of furniture or school apparatus, or for the construction of roads or bridges, the fact will still remain that the State of Montana, by its constitution has placed a restriction upon itself and upon its legislature, as expressed in the section of the state constitution above quoted.

If, as contended by appellant, this grant and the acceptance thereof is a contract, then, we ask, "who are the contracting parties?" certainly not the United States and Mr. Haire, the plaintiff in error herein, nor the United States and the state legislature, for the legislature has no existence separate from the state, but these contracting parties must be the United States and the State of Montana. By what right then, does the plaintiff in error demand that this court construe a contract to which he is not a party? Clearly the only purpose of this plaintiff in error is to have this court declare valid an act of the state legislature, notwithstanding the fact that that act is in direct contravention of the state constitution. The concluding clause of section 17 of the Enabling Act, "And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes therein mentioned, in such manner as the legislatures of the respective states may severally provide," does not have the effect of constituting the state legislature the agent of the United States for the disposition of these lands, but the legislature is named in the act only because it is the department of the state government vested by the state constitution with the authority of enacting laws and prescribing rules for the disposition of state property, but these laws and rules cannot contravene the state constitution which created the legislature and to which it must look for its authority to exist at all. A grant of

land to the state with a power vested in an agent to dispose of the land according to the will of the agent and without regard to the will of the state would, in effect, be a grant to such agent. The state would only be a "dummy" in such a transaction, but said section 17 specifically declares that the grant in this case is made "to the State of Montana."

No federal question can be predicated on such a claim or theory of supreme legislative agency.

To give the plaintiff in error the relief demanded it will be necessary for this court to declare void this section of the state constitution. The defendant in error insists that there is no federal question involved herein and that this cause should be dismissed.

No formal motion has been made to dismiss this cause on jurisdictional grounds for the reason that we understand the rule to be as stated by the honorable Circuit Judge Gilbert in United States v. North Bloomfield Gravel Min. Co., 53 Fed. Rep. 625:

> "There can be no question of the right of the defendant to raise this objection to the jurisdiction upon final hearing. It is not a question of personal privilege, which can be waived by answer or by going to trial upon the merits. It is a fundamental question, that goes to the right of the court to hear and determine the matters involved in the suit. If the courts have not the inherent power to hear and determine the cause, the parties to the suit cannot, either by their failure or neglect to attack the jurisdiction or by their express consent and desire to confer jurisdiction, authorize the court to proceed. The judgment of the court in such a case would be a nullity. Hence it is not left to the parties alone to raise the question of the jurisdiction, but by statute it is made the duty of the court itself to dismiss the cause, upon its own motion, whenever the want of jurisdiction shall appear. Grace v. Insurance

Co., 109 U. S. 278, 3 Sup. Ct. Rep. 207; Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. Rep. 407; Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. Rep. 510."

Without waiving the above objections to the jurisdiction of this Honorable Court to hear and decide this case, we shall proceed to brief and argue the questions presented by the record.

STATEMENT OF CASE.

This action was brought for a writ of mandamus to compel the defendant in error, James H. Rice, as State Treasurer, to pay the plaintiff in error, Charles S. Haire, twelve hundred dollars, the amount of a certain warrant issued to said Haire by the State Auditor against what was designated as the "State Normal School Fund," for services performed by him as architect and superintendent of construction in connection with the erection of an addition to the State Normal School at Dillon, Montana.

As appears from the petition (Record pp. 1 to 5), "the state board of land commissioners of the State of Montana, pursuant to the authority conferred by and the directions contained in an act of the legislative assembly of Montana (appendix to brief of Plaintiff in error, p. 40), issued coupon bonds to the amount of seventy-five thousand dollars, dated May 1, 1905, of the denomination of one thousand dollars each. (For copy of one of said bonds, see Record pp. 4 and 5.)

Said law and bonds attempted to pledge for the payment of such bonds and accruing interest thereon, "all

funds realized from the sale or the leasing of the lands, and licenses to cut trees thereon, said lands comprising one hundred thousand acres, granted by the United States to the State of Montana," "for state normal schools," under and by virtue of an act of Congress, approved February 22, 1889, entitled: "An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form state governments and to be admitted into the Union on an equal footing with the original states and to make donations of public lands to such states" (25 Stat. 676), which said act will be hereinafter referred to in this brief as "The Enabling Act."

To said petition filed herein defendant in error demurred for the reason that it did not state facts sufficient to constitute a cause of action; and to the alternative writ of mandate issued, defendant in error made a motion to quash upon the grounds that the petition upon which the writ was issued did not state facts sufficient to constitute a cause of action or to entitle the plaintiff in error to the relief demanded or any relief, and that the petition showed on its face that the act of the legislature mentioned in said petition pursuant to which said bonds were issued is violative of the provisions of said Enabling Act and of the State Constitution, and further, for the reason that said petition showed on its face, that the issue of the bonds mentioned therein constituted a State indebtedness in excess of the Constitutional limit of one hundred thousand dollars, without authority of law. (See Record pp. 7 and 8.)

The said motion to quash was sustained and the proceedings dismissed. (Record p. 8.) Whereupon plaintiff in error petitioned for a writ of error to this court. (Record pp. 36 to 41.)

When reference is hereinafter made to bonds of State institutions, or to state normal school bonds, it is simply for the purpose of convenience and brevity, and it is not to be taken as an admission on the part of the defendant in error that they are legally entitled to such designation.

QUESTIONS PRESENTED.

1. Does section 11 of the Enabling Act limit and control the grants of land made to the states by section 17 of said act in the same manner as it does the grants made by the other sections of said act?

2. If said section 11 of the Enabling Act does limit and control the grants made by said section 17 thereof, does the act of the legislature of Montana, approved February 2nd, 1905, and set out in appendix to brief of plaintiff in error (pp. 40 to 45), violate the provisions of said section 11?

3. If said section 11 of the enabling act does not limit and control said section 17 thereof, then does the title to the lands therein granted, when selected, vest in the State free of any limitations or conditions?

4. If the title to the lands granted by said section 17 of the Enabling Act vests, when selected, in the states without any limitations or conditions, then, under the last clause of said section 17, must such lands be "held, appropriated and disposed of" *only* "in such manner as the legislatures of the respective states may severally provide, or may the constitutional conventions of the states to which such lands were granted accept the grants, and in the constitutions by them adopted impose limitations and conditions upon the use and disposal of the same, and upon the proceeds received from the sale

thereof, which will be controling and binding upon the legislatures established and provided for by said constitutions?

5. If the constitution of Montana may lawfully impose any condition or limitation upon the lands granted by section 17 of the Enabling Act, does the act of the legislature of Montana, approved February 2nd, 1905 (see appendix to brief of plaintiff in error), violate the provisions of section 3 and 12 of Art. XI, of the State Constitution?

BRIEF AND ARGUMENT.

THE ENABLING ACT.

Before taking up the construction of the Enabling Act of this State, we deem it important to briefly review the policy of the National Government in granting lands to the various states.

Review of Statutes.

Many grants of land and other donations have been made by Congress to the several States from time to time for specific and general purposes. All these grants and donations may be classified and are either for,

1. Internal improvements,
2. Educational purposes.

1. *Internal Improvements.*

The principal grants for internal improvements are the grants of September 4, 1841, (U. S. Stats. 453), and

the act of September 28, 1850 (Secs. 2479-2481, Rev. Stat. U. S. 1878). Both these acts are referred to in section 17 of the Montana Enabling Act, with reference to the grant of land "for state normal schools."

Section 8 of the Act of September 4, 1841, grants five hundred thousand acres of land to each state mentioned in the act and to each new state afterwards admitted into the Union, "for the purpose of internal improvements." Section 9 of the act provides that the land granted shall not be disposed of at a price less than $1.25 per acre, and the net proceeds of the sale of said land shall be faithfully applied to the objects of internal improvement—namely, roads, railroads, bridges, canals, improvement of water courses and draining of swamps, and such roads, railroads, canals, bridges and water courses shall be free for the transportation of the United States mail and munitions of war and for the passage of troops without the payment of any toll whatever.

By the terms of this grant the government retained a perpetual easement, right or interest in the objects to be attained by the grant, and if that part of the grant naming the purposes of the grant were not repealed by the Enabling Act, none of the money derived from the sale of the land could, without a violation of faith on the part of the state, be used for the erection of school buildings, or for the maintenance, perpetuation or support of educational institutions, for such purposes are totally foreign to the purposes of the original grant.

The Act of September 28, 1850, granted, in fee simple, certain swamp and overflow lands to certain states, to *enable the states* to reclaim such lands. This act also provides "the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied ex-

clusively, as far as necessary, to the reclaiming of said lands by means of levees and drains."

This grant was made without condition or restriction and for the sole benefit of the state, the government retained no right, no interest, no easement in the land or in the improvements placed thereon. The state could choose its own time and manner of making such reclamation; it could construct embankments, levees or roads, excavate drains or establish railroads, or could use the money received from the sale of the land, if such land could be sold prior to reclamation, for such purposes, or it could use such money for other purposes and make appropriations in kind for such improvements, or accomplish the reclamation without appropriation. The purposes of this grant, and the power of the state thereunder, are fully discussed in Mills County v. Railway, 107 U. S. 557, where the court says, in part:

> "Swamp and overflow lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas the state governments, being concerned in their settlement and improvement, in the opening up of roads and other public works through them, in the promotion of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the part of Congress to cede these lands to the states in which they lay, subject to the disposal of their respective legislatures; and although it is specially provided that the proceeds of such lands shall be applied, 'as far as necessary,' to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the states alone, when they accepted the grant; and, whether faithfully performed or not, is a question between the United States and the

states, and is neither a trust following the lands nor a duty which private parties can enforce as against the state."

See also, U. S. v. Louisiana, 127 U. S. 182.

The state cannot claim any authority from the terms of this act, making one of the original grants referred to in section 17 of the Enabling Act, for the reason that by the terms of said section 17 such original grant does not extend to Montana. Furthermore, the question here is not how far the state may with safety go in disregarding its promise, but rather how that promise may be best kept and obeyed in its entirety, and how the state may best observe the spirit as well as the letter of its plighted faith in the discharge of its duties as trustee of an express trust, and bring into captivity every thought and energy to the obedience of a promise made; a pledge given; a trust accepted.

2. *Grants for Educational Purposes.*

By the Act of Congress of July 2, 1862, c. 130, 12 Stat. 503, amended by the Act of March 3, 1883, c. 102, 22 Stat. 484, Congress granted to each state, for agricultural college purposes, thirty thousand acres of land "for each senator and representative such state has in Congress."

This grant is made upon certain conditions named in section 5 of the act "to which, as well as the provisions hereinbefore contained, the previous assent of the several states shall be signified by legislative acts." The previous conditions named in the act are, that the principal arising from the sale of the lands shall forever remain unimpaired; that the money shall constitute a perpetual fund which shall forever remain undiminished.

Sub-division 2 of section 5 of this act provides: "No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings."

The only legislative assent that has ever been given by the State of Montana to the terms and conditions of this grant is contained in sub-division 7, Ordinance 1, of the State Constitution, which is that "the State of Montana hereby accepts the several grants of land from the United States to the State of Montana mentioned in an act of Congress (Montana Enabling Act), * * * approved February 22, 1889, upon the terms and conditions therein provided." This grant is confirmed and extended to the State of Montana by section 16 of the Enabling Act. But this section does not mention the conditions of the grant above referred to, nor does the Enabling Act anywhere contain these conditions, except by the limitations as to the use of the funds expressed in section 11 of the Enabling Act. The assent to the conditions named in the original act was imperative to the attaching of the grant. Yet the government has recognized this acceptance contained in the ordinance as sufficient to give effect to the grant and has issued patents for the land. In doing this the government must necessarily have construed the limitations expressed in section 11 of said Enabling Act as applying to the grant named in section 16 of said act. And as section 11 must be read in connection with section 16, it must likewise be read in connection with section 17 of said Enabling Act. Furthermore, this Act of 1862 contains many other conditions which must be complied with on the part of the state, among them being, that the funds shall be invested and

shall yield not less than five per cent. per annum, and that if the state fail to comply with the conditions of the grant the grant does not attach. Yet, unless the provisions of said section 11 of our Enabling Act apply to this grant as named in section 16 of the Enabling Act, the original Act of 1862 stands in its entirety and imposes conditions which never have been complied with by the State of Montana.

The Act of Congress of May 26, 1864, 13 Stat. 91, (Sec. 1946, Rev. Stats. U. S.) reserves, for the purpose of being applied to the common schools, sections 16 and 36 of each township of the territory. Title to such lands became vested in the state by the provisions of section 10 of the Enabling Act, the expressed purpose of the grant being for the support of common schools. Prior to the admission of the territory as a state, this was a mere reservation and not a grant.

U. S. v. Bisel, 8 Mont. 20.

The act of February 18, 1881 (21 Stat. 326), granted to the Territory of Montana seventy-two sections of land for the use and support of a university. The conditions of this grant, as expressed in the original act, are in substance, that the lands must be appraised and must be sold at public auction at not less than the appraised value, and in no case for less than $2.50 per acre and not more than one-tenth to be sold in any one year, the money to be invested in United States bonds, and that

> "No part of said fund shall be expended for university buildings, or the salary of professors or teachers, until the same shall amount to $50,000, and then only shall the interest on said funds be used for either of the foregoing purposes, until the said fund shall amount to $100,000 when any ex-

> cess, and the interest thereof, may be used for the proper establishment and support respectively of said universities."

It will be noticed that by the terms of this grant, specific direction is given as to the securities in which the funds must be invested; also that neither principal nor interest could be used until the fund reached $50,000, and then only the interest could be expended for (a) university buildings; (b) salaries of professors or teachers. After the fund had reached $100,000 the excess as well as the interest might be used for (a) the proper establishment and support of the university. The authority to use any portion of this fund or the interest thereon for university buildings is very carefully eliminatted in the concluding part of the section, the words there used are "establishment and support." The word "establishment" there cannot have the same meaning as a building fund, otherwise the term above employed, conferring the authority to use a part of the income for the construction of a building (if that is the meaning) would not have been eliminated and the word "establishment" used. Furthermore, the buildings were presumed to have been constructed prior to the time when the fund reached $100,000.

This grant is vested in the State of Montana by the provisions of section 14 of the Enabling Act, and the original act is

> "So amended as to provide that none of said lands shall be sold for less than $10.00 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally and the income thereof to be used exclusively for university purposes."

This section of the Enabling Act makes some further amendment of the original act and refers back to section 11 of the Enabling Act. The amendments made bring the entire section (14) within the purview and meaning of section 11 of the Enabling Act, showing clearly that it was the intent of Congress that the provisions of said section 11 apply to the construction of said section 14, as well as to the construction of the original act of 1881. And a reading of our Constitution makes it very clear that the Constitutional convention placed this construction upon said amended grant for the State University. (Sec. 12, Art. XI, above quoted.) And if section 11 of the Enabling Act applies to the grant made for a state university contained in section 14 thereof, it is quite clear that it must have been intended, and does apply, to the land grants "made for other educational purposes" contained in section 17 of said Enabling Act. And this was clearly the construction placed thereon by the Constitutional convention. (Sec. 12 of Art. XI, Const. above quoted.)

Furthermore, said section 14 contains this provision:

> "None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. Schools, colleges and universities provided for in this act, shall forever remain under the exclusive control of the said states, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college or university."

It cannot be contended that this part of section 14

does not refer to all of the land grants made for educational purposes, because the schools, colleges and universities are specifically enumerated, yet the only manner in which that part of the section prohibiting the use of these funds for sectarian purposes is connected with section 17 of the enabling act is by the phrase "herein granted for educational purposes." This is the same phrase that is used in said section 11, and if the use of this phrase in section 14 serves as a connective to bring all of the land grants within the prohibition of section 14, why would it not have the same meaning when used in section 11, for there is no language employed in said section 11 that gives to this phrase any other meaning than that which it has in section 14.

Section 13 of the Enabling Act grants five per centum of the proceeds of the sales of Public lands within the state to the state "to be used as a permanent Fund the interest of which only shall be expended for the support of common schools."

The Act of August 30, 1890, 26 Stat. 417 (U. S. Compiled Stat. 1901, page 3214) authorizes $25,000.00 to be paid out of the treasury of the U. S. to each state and territory for certain educational purposes. Several conditions are attached to this grant or donation among them being

> "And no portion of said money shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings."

These various original acts of congress are not special laws for the sole benefit of Montana but are general laws relating for the most part to all the states and

territories, and each of the laws contains a restriction against the use of the funds for building purposes; and in all of the grants and donations this restriction amounts to a positive prohibition, except the single act of Feb. 18, 1881, and that act is so amended by the Enabling Act as to include this positive prohibition.

It is not only the policy but the settled law of Congress to deal equally with all of the states, for all the states are admitted on an equal footing.

It would require the controling influence of an express congressional provision to that effect, before we would be justified in holding that it was the intention of Congress to wipe out all these restrictions and to give to the State of Montana greater rights and privileges *than was ever granted TO ANY OTHER STATE.*

Public Grants are most strictly construed against the grantee.

(Southerland Stat. Construct. Par. 378 and cases cited.)

If we give the Enabling Act a strict construction or even a liberal construction we may look in vain for provision warranting a conclusion that it was the intention of congress to deal with Montana as though it stood on a superior footing instead of on an equal footing with the other states.

It is idle to say, that the general government has no further interest or concern in the land grants made to Montana, for educational purposes; for surely it's interest in the education and character of it's citizens, is not only great but perpetual. It has a direct interest and purpose to see that the trust is carried out by the state, for it is as much concerned in the education of its people as is the State itself.

CONSTRUCTION OF THE ENABLING ACT.

Sec. 10 of the enabling act grants to the State of Montana sections numbered 16 and 36 in every township, for the support of common schools, and reads as follows:

> "That upon the admission of each of said states into the union sections numbered sixteen and thirty-six in every township of said proposed state, and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivision of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the secretary of the interior; *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

And Sec. 11 of the enabling act is as follows:

> "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under

such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

It is apparent from the wording of said Section 11 that it is intended to be a clear and distinct limitation as to all grants of lands mentioned in the enabling act and made *to the state for educational purposes.*

Said Section 11 is an independent section and is connected with the balance of the act of which it is a part, only by the conditions, limitations and permission prescribed and given regarding the disposition of the various land grants mentioned in the act itself. If this section relates only to the grants mentioned in section 10 of the enabling act, why was it necessary to make of it a separate and independent section? In said section 10 the term "common schools" is used, while in section 11 the use of this term is studiously avoided and the term "permanent schools" and "school" are used. Why this switching of terms if only the one grant is meant? The "common school fund" is only a part of the "permanent school fund" for the latter includes all the permanent funds of the various educational institution, as will hereafter appear.

The language employed in said Section 11 is perfectly general. It does not limit the application of the section to any one grant, but makes it equally applicable to all the land grants.

The word "herein" has a distinct and specific meaning. It is defined by all lexicographers to mean "in

this", substituting this acknowledged meaning of the word for the word itself, and the phrase will read "that all lands *in this* granted, etc."

In this what granted? Not is this Section 11, for no grant is made by that section. Certainly not "in this preceding Section 10", nor "in this subsequent Section 17", but "in this act of Congress granted." "The words 'herein provided', or 'not herein provided for', as used in the United States statutes generally, if not always, refer to the act, chapter or title, and not to the section. Before the revision they referred to the act or chapter, but since, more generally, to the title."

May v. Simons, 4 Fed. 499.

The word "herein" relates to the act in which it is found and is not confined to the section in which it is used.

State v. Glenn et al, 7 Heisk, (Tenn.) 472.

The word "herein" as used in tariff and revenue laws of the United States, relates to the entire act.

Arthurs' Executors v. Butterfield, 125 U. S. 70.
Smythe v. Fiske, 90 U. S. 347.
Movious v. Arthur, 95 U. S. 144.

Iasigi v. Iasigi, a Massachusetts case, involved the construction of a will which consisted of twelve articles. In articles 1, 2, 3, 4 and 5, certain bequests and devises were made to the sons. Article 6 provided, "all moneys herein directed to be given to each of my sons * * * shall be held, invested and managed by my said trustee," etc. Article 9 provided "all the rest and residue of my property * * * I give, devise and bequeath to my sons." It was contended that this limitation con-

tained in article 6 applied only to the preceding articles, but the court said "but article 6 is not limited to what precedes. It is a general direction applicable to all moneys which are given to these two sons by the will. The words 'all moneys herein directed', mean both hereinbefore and hereinafter directed."

Iasigi v. Iasigi, 161 Mass. 175.
Parker v. Iasigi, 138 Mass. 416.
In re Pearsons' Estate, 98 Cal., 33 Pac. 451.

Section 17 of the enabling act contains this provision:

"And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the various states may severally provide."

But said Section 17 nowhere contains any direction as to the appropriation or disposition of the funds received from the sale of the lands granted, nor are such directions found anywhere in the Enabling Act except in Sections 11 and 14. Unless, therefore, Section 11, and the prohibitions and restrictions expressed in Section 14 apply to said Section 17, the concluding clause of the latter section is entirely meaningless. In State v. Maynard, State Treasurer, 71 Pac. 775, the Supreme Court of Washington in construing this identical Enabling Act, said:

"If Congress intended Section 11 to be only a limitation to Section 10, and not to apply to the whole act, it was very unfortunate in the use of words to express that intention, even if the making of Section 11 an independent section was an inadvertence. But taking this section as we find it—an independent section—in connection with the general words used, it seems conclusive to our

minds that Congress intended to make it refer, not only to the preceding section, but to the whole act, and the words 'herein' and 'educational' purposes, were used advisedly to refer to all lands granted for such purpose in the whole act. The clause in Section 17 as follows, 'and the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the several respective states may severally provide,' refers to the manner of the holding, appropriating and disposing of the lands, and must be construed with reference to the limitations contained in Section 11 as to the lands granted for educational purposes. The manner of disposing or selling of such lands, and the manner of holding or investment of the proceeds and the appropriation of the interest or income, are subject to the limitations contained in Section 11 of the act. The States of North Dakota, South Dakota, and Montana, have all placed the above construction upon the land grants for normal schools, by adopting constitutional provisions declaring the proceeds of such lands a permanent fund.

See

Const. N. D. Art. 9, Par. 159.
Const. S. D. Art. 8, Par. 7.
Const. Mont. Art. 11, Par. 12.

We think this construction accords with the policy of the Federal Government towards the educational institutions named in the Enabling Act. It does no violence to any of the provisions of the act, and conduces to the permanency of the normal schools."

This same construction is given to this language of the Enabling Act by the Supreme Courts of North Dakota and Idaho.

See also,

State v. McMillan, N. D. 96, N. W. 310.
Roach et al v. Gooding et al, 81 Pac. (Ida.) 642.

The Supreme Court of Montana, in the case at bar, having based its decision upon the conflict between the act of the legislative assembly of Montana and said Section 12 of Article XI of the State Constitution, did not deem it necessary to go into the merits of the question of what effect Section 11 of the Enabling Act had upon said Section 17 thereof. It disposed of such question in the following language:

> "A great deal of consideration was given by counsel to the question whether or not the language of Section 11 of the Enabling Act modifies the language of Section 17; and while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case." (Opinion of Court at page 32 of Record.)

We respectfully submit that the construction placed upon said Sections 11 and 17 of the Enabling Act by the Supreme Courts of North Dakota, Washington, and Idaho is correct, and that the opinion of the Supreme Court of Montana, in so far as it intimates that said Section 11 does not modify said Section 17 is incorrect.

It is contended by plaintiff in error that the grants named in Section 17 of the Enabling Act are not subject to the limitations expressed in Section 11 of that Act, but are wholly at the will of the State Legislature with reference to the disposition of the funds arising from the sale of the lands granted. If this construction is sustained then said Section 17 is an independent section and the grants therein made are not subject to

any condition for the phrase "for State Normal Schools" or even the phrase "For the establishment and maintaining of State Normal Schools" does not express any condition legally binding on the State.

A grant of land to the state for the purpose named in the act that leaves the state the *sole* judge of when that purpose is accomplished is not a grant on condition.

Mills County v. Railway, 107 U. S. 557;
U. S. v. Louisiana, 127 U. S. 182;
Cook Co. v. Canal Co., 138 U. S. 635.

If then this grant is without condition, the state owns these lands the same as though title had been obtained from some other source. Being the owner of the fee simple, without condition or restriction, the state in the exercise of its sovereign authority can either by constitutional provision or legislative enactment, place a restriction upon the use of these funds.

Section 12 of Article 11 of the State Constitution contains that restriction.

If, on the other hand, the limitations of Section 11 of the Enabling Act apply to the grants for educational purposes enumerated in said Section 17, then it is immaterial whether said Section 12, Article 11 State Constitution is valid or invalid, for the limitations of said Section 11 of the Enabling Act positively prohibits the use of these funds as a building fund.

But said Section 12, Article 11 of the State Constitution, is neither void nor elliptical. It is only a restatement of the conditions and limitation of Section 11 of the Enabling Act, and if additional limitations *are* prescribed, it is a proper exercise of the sovereign power

of the state, at least no one but the United States can complain.

107 U. S. 557, above.
127 U. S. 182, above.

The plaintiff in error asks the court to amend the Enabling Act by striking out the word "herein" and inserting the word "hereinbefore," or the word "therein," where the same occurs in Section 11 of that Act, and to treat Section 12, Article 11, State Constitution, as an ellipsis, and then supply the omitted words, whatever those words are.

If such amendment can be made we will then admit that Section 11 applies only to the grants in Section 10, and if the word "hereinafter" is inserted, the limitations would apply only to subsequent grants. Defendant in error insists that both the Enabling Act and the Constitution should be taken and construed as they are, without any amendment.

Section 10 of the Enabling Act grants lands for common schools. Section 11 is an independent section. Section 12 makes a grant for public buildings. Then follows Section 13 making another donation for common schools, while Section 17 makes another grant for public buildings. We do not know why this order was followed, but it cannot invalidate the act nor change its meaning.

Each of the grants for educational purposes confers upon the state certain rights which had been given to other states by specific acts of congress widely separated in point of time. Section 10 of the Enabling Act has reference to the act of 1864, reserving Section 16 and 36 in each township for school purposes.

The right conferred by Section 13 was initiated by

the act of Congress of 1811 relating to Louisiana, (2 Stat. 641). Section 14 deals with the grant made by the act of 1881, and the title had vested in the Territory of Montana. In dealing with this grant, congress was dealing with lands, the title to which had already passed from the United States and vested in the Territory. The general limitations in Section 11 would not apply to lands already owned by the Territory, hence specific provisions were made in Section 14 and the Territory accepted these provisions before it could be vested with statehood.

Section 16 of the Enabling Act has reference to the act of 1862.

The grants in Section 17 of the Enabling Act are in lieu of the grants made by the Acts of 1841 and 1850. The grant of 1850 was a grant in *presenti* only as to the states named in the act.

Section 2479 et seq., Rev. Stat. U. S. 1878.
Mills County v. Railway, 107 U. S. 557.
U. S. v. Louisiana, 127 U. S. 82.

The grant of 1842 was a grant *in futuro* and never did vest in the State of Montana.

McNee v. Donahue, 142 U. S. 587.

And said Section 17 of the Enabling Act repeals the act of 1841 and declares that the grant of 1850 does not extend to Montana. How then can the State claim any authority from either of these original grants? Neither the act of 1841, nor that of 1850 gave authority to use any part of the funds for the erection of school buildings. The first grant (1841) was for roads, bridges, canals, etc., the second grant (1850) was for the drainage of swamps.

Plaintiff in error claims that by virtue of the provisions of Section 19 of the Enabling Act, which reads as follows, to-wit:

> "That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective states entitled thereto;"

that Section 11 of the Enabling Act, because of the use of the word "unsurveyed," was not intended to limit the grants of land "in quantity" made in Section 17 of said act, and therefore, of necessity, must limit only the grants made in Section 10. But defendant in error insists that the same objections arise in relation to Section 10 when we seek to give the word "unsurveyed" the full force and effect that counsel for plaintiff in error insists upon giving it when used in connection with Section 17, and that for that reason, their conclusion that Section 11 only applies to Section 10 is unsound.

There is nothing whatever in the last clause of Section 11 to indicate that such section was intended to apply only to the grants of land mentioned in Section 10 and not to the grants in Section 17.

The word "unsurveyed" as there used, if it has any force or effect whatever, would apply to unsurveyed lands from which selections might be made by the state when surveyed as well as it would be to unsurveyed lands which when surveyed would be Sections 16 and 36, to which the title of the state would attach without selection.

Until the government survey has been made the location of Section 16 and 36 was just as indefinite and uncertain as was the location of the sections that might be selected by the state for the grants under Section 17.

Especially is this true of the lands granted by Section 10 in lieu of Sections 16 and 36. It is just as impossible to tell from what sections these lieu lands will be selected by the State as it is to tell from what sections the grants in Section 17 will be selected. Therefore, if the word "unsurveyed" in Section 11 has, as claimed by counsel for plaintiff in error, the effect of withdrawing all unsurveyed public land from settlement, prior to its survey and the State's selection therefrom made to satisfy the grants in Section 17, it would also, of necessity, have the effect of withdrawing all the unsurveyed public land from settlement until it had been surveyed and the State had selected the lieu lands granted to it by Section 10.

Prior to the government survey there was no way of determining what particular land was embraced in Section 16 or 36. Private surveys are not recognized by the United States for the purpose of identifying lands granted by it. In the case of United States v. Montana Lumber and Manf. Co., 196 U. S. 573, the Supreme Court of the United States said:

> "The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey made by Ashley. Indeed, it would reverse the statutory grant of powers and transfer the location of a section from the government to the railroad company."

If we say that by the use of "unsurveyed" in the last clause of Section 11 that such section was not intended by Congress to apply to the grants of land in quantity for the reason that it is impossible to determine where such lands are located until surveyed and selected under the direction of the Secretary of the Interior, we can also, from the same line of reasoning, say that

said Section 11 was not intended by Congress to apply to the grants of land made by Section 10 where the land has not been surveyed and an exact location of sections 16 and 36 determined.

The last clause of Section 11 was inserted as a general saving clause to prevent future *entries*, under the land laws, of the lands granted to the state. In endeavoring to make the language as comprehensive as possible, the terms, "surveyed and unsurveyed" were used. The sentence would have had just as much force and effect, however, if the word "unsurveyed" had been omitted, as, at that time, no *"entry under the land laws of the United States"* could be made in any event until the land had been surveyed by the government.

Congress in its desire to protect the lands granted as endowments for educational institutions endeavored by Section 11 to guard against possible loss of said land or dissipation of the proceeds received therefrom, and if, in order to fully carry out this intention, and to head off every possible avenue to defeating these grants, in an over-abundance of caution, words not necessary to be used and which under the circumstances were inoperative were inserted therein, they could in no way defeat the objects of the section or impair the force or effect of the necessary and operative words therein used. The plain and unmistakable intention of the section cannot be defeated by the use of a word, which, as used therein is too comprehensive and, therefore, of necessity inoperative. In Holy Trinity Church v. United States, 143 U. S., 259, the court in discussing the rule of interpretation of words and clauses of general meaning, said, "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances sur-

rounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Also see Heydenfeldt v. Daney Gold and Silver M. Co., 93 U. S. 634.

If the word "unsurveyed" as used in said Section 11 is to be given the full force and effect insisted upon by plaintiff in error, then it would defeat the rights of a bona fide settler who had settled upon unsurveyed land at any time in the past, for instance, in the year 1860, 1870 or 1880. For there is no exception whatever in the last clause of Section 11 to the effect that it does not apply to unsurveyed lands upon which settlement had been made by bona fide settlers either prior or subsequent to the passage of said Section 11.

It must of necessity be held that the last clause of Section 11 simply means that when lands are surveyed and open for "*entry* under the land laws of the United States," that those "herein granted" the state and definitely determined and selected, shall not be subject to entry under the land laws of the U. S.

This word "unsurveyed" as used in Section 11 was absolutely inoperative until some future legislation was enacted to put it into effect, as there was no law providing for the making of an *entry* under the land laws upon unsurveyed land. However, Congress by subsequent legislation has put into effect the idea suggested by the word "unsurveyed" as used in Section 11, by enacting a law which provides that the Governor may make application for a survey of unsurveyed lands "with a view to satisfy the public land grants made by

the several acts admitting the said states into the Union to the extent of the full quantity of land called for thereby;" and that upon the filing of the application for the survey, the lands that may be found to fall within the limits of such townships, as ascertained by the survey, shall be reserved from any adverse appropriation by settlement or otherwise, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the plat of survey.

See Act of Aug. 18, 1894, 28 Stat. 372.

This is the only law which makes the word "unsurveyed" in Section 11 operative by providing for the making of an application for *entry* prior to the survey of the land and this privilege is given only to the States. Furthermore, the state's title to 16 and 36 could not attach to any particular tract of land until it had been definitely located by official survey duly approved, and the state's title to grants of land in quantity could not attach to any particular tract of land until it had been surveyed and duly selected under the directions of the Secretary of the Interior. In neither case was the grant fully completed so that the land could be sold or leased by the state, until the above acts had been fully consummated, and in either case it was only when such acts had been consummated, and title attached to the particular tract of land that the land can be considered as "granted for educational purposes" as that phrase is used in Section 11. Section 11 says "all lands herein granted for educational purposes," etc. This means lands to which the title of the state had attached—all acts being consummated. That is, the grant was completed by the lands having been surveyed and found to be sections 16 and 36, or surveyed and duly selected by the state.

The last clause of Section 11 says "and such lands," etc. To what does the words "such lands" refer? Either to the lands that may "be leased for periods of not more than five years," or "all lands herein granted," and in either case it would be referring to the lands, the grants of which had been fully completed and the title of the state thereto fully attached.

So when it is said "and such lands shall not be subject to pre-emption, homestead entry, etc." It means those lands to which the state's title has fully attached by reason of the land having been definitely located, whether it be lands granted in quantity or sections 16 and 36. It could not mean anything else for the reason that it says "all lands herein granted * * * shall be disposed of only at public sale. * * * But said lands may be leased," etc. Certainly it will not be contended that the state can sell or lease either sections 16 or 36 or lands granted in quantity prior to the survey thereof and the attaching of title to the particular tract to be sold or leased.

So there is no merit whatever in the contention that by the use of the word "unsurveyed" in Section 11 it must be held to apply only to Section 10 and not to other grants for educational purposes, for the reason that any argument advanced to show that it does not apply to grants in quantity may be urged with equal force to show that it does not apply to grants including indemnity lands, mentioned in Section 10 prior to the survey of the land.

Defendant in error does not claim that the effect of "unsurveyed" as used in Section 11 was to prevent settlers from acquiring rights upon unsurveyed lands which would be superior to the State's right, should it attempt to select the lands, so settled upon, to satisfy the grants in quantity. We do not believe Congress

had any such intention at the time it enacted Section 11 of the Enabling Act. But on the other hand we also insist that Congress never intended by Section 11 to prevent settlers from acquiring rights upon unsurveyed land which, when surveyed, would be located in section 16 and 36; or that by Section 11 Congress intended that the indemnity lands granted to the State in Section 10 were not to be subject to settlement by bona fide settlers prior to the survey of the land and the selection of such lieu lands by the State.

The above illustrations clearly show that in no event can the word "unsurveyed" be given the force and effect that plaintiff in error asks the court to give it when construed in connection with Section 17. For if it is, we are forced to the conclusion that it was not intended to apply to either Section 10 or Section 17 of the Enabling Act.

Therefore we submit that it cannot be held that, by the use of "unsurveyed" therein, Section 11 was intended to apply to Section 10, and not to Section 17. The absurdity is as great in the one instance as the other. We must either hold that because of the word "unsurveyed," Section 11 was not intended to be a limitation upon either Section 10 or 17, or we must hold that the word as there used is inoperative, by reason of the general law governing settlements upon unsurveyed lands and that, therefore, Section 11 applies with as much force to Section 17 as it does to Section 10.

If we hold that Section 11 does not apply to either Section 10 or 17 because of the word "unsurveyed" therein, then the whole of Section 11 becomes a nullity and ceases to be a limitation upon any of the grants mentioned in the Enabling Act.

But by giving to the word "unsurveyed" in Section 11

the construction given to that word, as used in the Enabling Act of Nevada, by the United States Supreme Court in Heydenfelt v. Gold & Silver Mining Co., 93 U. S. 634, the section would stand and be a limitation upon all grants for educational purposes after the lands had been surveyed and selected and the title of the State fully attached thereto.

The opinion in the Heydenfelt case, by holding that the word "unsurveyed" can not apply to Sections 16 and 36 prior to survey, completely answers the argument plaintiff in error attempts to make upon the use of the word "unsurveyed" in Section 11 of the Enabling Act.

Also Mining Co. v. Consolidated Mining Co., 102 U. S. 167.

The Act of Congress of 1891 is not an act to amend Section 11 of the Enabling Act, but an act to amend Section 2275, Rev. Stat. U. S. for the purpose of giving the state an option of selecting other lands in lieu of state lands located on Indian and Military Reservations and mineral lands.

U. S. Comp. Stats. 1901, p. 1381.

Moreover, if relator's contention, that the Enabling Act is a contract, is correct, it is beyond the power of Congress to amend that act in any respect whatsoever, and there is nothing in this amendatory act of 1891 to indicate that congress had in mind Section 11 of the Enabling Act. The amendatory act amended the general statutes without reference to any particular state.

Therefore, the act amending Section 2275 of Revised Statutes of U. S. can in no way whatever be considered as a construction placed by Congress upon said Section 11.

Much stress is laid upon the words "establishment and maintenance" as used in that portion of Section 17 of the Enabling Act, which grants lands to Montana for educational purposes. The grant "for state normal schools" is as clear and explicit as language can make it. The sentence is complete, and is neither elliptical or ambiguous, and by it there is granted to the State of Montana one hundred thousand acres "for State Normal Schools." Grammatical rules do not demand that the words "establish and maintenance" be considered as omitted and treated as though actually used as a part of the language of this grant, as contended by counsel for plaintiff in error. If there is any such rule of grammar, we should like to have it more definitely pointed out. The legislative intent is clear so far as this grant is concerned. One hundred thousand acres of land is granted to Montana to be held and disposed of as the legislature may prescribe, provided, that it shall not disregard the limitations and restrictions placed upon it by the provisions of the grant itself and of the state constitution. However, it is claimed that such words, as there used, include the erection of buildings. While the words "establishment and maintenance" are not used in connection with the grant of lands for said normal schools, as above shown, and from the punctuation used in said Section 17 cannot by any rules of construction be read in as a part of such grant, what would be the effect upon such grant if such words were construed to apply thereto.

As is pointed out elsewhere in this brief, the uniform policy of Congress in making grants of land for educational purposes has been to limit the use of the land so granted and the proceeds derived therefrom to the support and maintenance of such institutions, and to

expressly provide that the same shall not be used to erect school buildings. Does Section 17 of the Enabling Act by the use of the word "establishment," if that word is to be construed in connection with the normal school grant, change the unbroken policy of Congress heretofore followed in making such grants? Webster defines the word "establish" as follows:

"(1) To make stable or firm; to fix or set unalterably; to settle or confirm.

(4) To originate and secure the permanent existence of; to found; to institute; said of a colony, a state, and other institutions."

The word "establishment" as used in the phrase "for the establishment and maintenance of" is defined by Webster, as follows:

"1. The act of establishing, founding, ratifying, or ordaining; settlement; confirmation.

2. The state of being established, founded, and the like.

3. That which is established; as, (a) A form of government, civil or ecclesiastical. (b) A permanent, civil, military, or commercial force or organization. (c) A style of living; accustomed expense; *fixed allowance* or *resources for subsistence; income;* salary."

To the same effect see Century and Bouvier dictionaries. The latter also says: "that 'establishment' is also used to denote the settlement of dower by the husband upon his wife." The standard dictionary defines "establishment" as follows:

"A settlement in life; particularly, a fixed allow-

ance or income." None of the above definitions of "establish" or "establishment" give such words a meaning synonymous with "build", "erect" or "construct." The words "establish" and "establishment" standing alone are never construed in the sense of "to construct" or "to erect" buildings. They are used in connection with incorporeal rather than corporeal things.

The Supreme Court of New York in 79 N. Y. Sup. 418, in construing the phrase "The Board of Sewer Commissioners of the Village may establish and maintain a sewer system therein," said: "The word 'establish' is not used in the sense of 'to construct' and that is not its meaning etymologically." It is true that some courts in construing the word "establish" or "establishment" have held that the words were used in the sense of "to construct or erect" buildings. Such a construction was given in the cases of Attorney General v. Hull, 9 Hare, 647, reported in Vol. 41 of Chancery Reports, 647. Ketcham v. City of Buffalo, 31 Barb. (N. Y.) 298; Buckram v. People, 27 Barb. (N. Y.) 264, and a few others.

However, upon an examination of all these cases it is found that where the words were held to have such a meaning, it was based wholly upon the context of the act in which they were used and which clearly modified the usual and ordinary meaning of the words. The word "establishment" as used in the Section 17 of the Enabling Act when construed according to its meaning etymologically, cannot be held to authorize the "erection" or "construction" of buildings. However, the word is employed by legislators in so many different senses that in almost every instance where it is used we have to look to the context to determine the particular meaning intended.

Cyc. Vol. 16, p. 591, in defining the word "establish" says:

> "It has been said that upon few words could there be more room for argument than upon this word; it has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by its context."

If, as is shown above, the word "establishment" when construed according to its technical meaning does not mean to "construct" or "erect" buildings, does the context of the Enabling Act justify such a construction of the word? As is shown above in this brief, section 11 of the Enabling Act must be read in connection with and modifies all sections of the Enabling Act which grant lands to the state for educational purposes. The wording of said section 11 settles all doubt as to the meaning intended by the word "establishment," as used in said section 17, for section 11 provides that the proceeds received from the lands granted for educational purposes shall

> "constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."

The proceeds from the lands granted by said section 17, in order to constitute a permanent fund, the interest only of which shall be used, must never be taken to erect school buildings that will decay and diminish in value and from which no interest would be received to be expended in support of said schools. To put money into school buildings which are not intended to yield any interest or income is not using such money so as to constitute a "fund" as that word is defined by Webster, Century and Bouvier dictionaries, or by the courts.

See "Words and Phrases," Vol. 4, p. 3004.

Said section 11 further provides that the interest received from such permanent fund shall be used only for certain purposes, namely, the support of said schools, and the authorities all hold that the word "support" as there used, does not include the construction or erection of buildings. Section 11 clearly shows, beyond any question of doubt, that the lands granted to the state for educational purposes were intended as an endowment, and that the proceeds therefrom were to constitute a permanent endowment fund. Hence it is clear from the context of the Enabling Act that the phrase "for the establishment and maintenance of" as used in section 17 means "for the *endowment* and *maintenance* of."

See Stroud's Judicial dictionary, which, in defining "establish" says: "compare 'endow,' and in defining 'endow' says: "compare 'establish.'" The authorities all hold that "maintenance" means the running or current expenses, and does not include the construction of buildings.

Sheldon v. Purdy, 49 Pac. (Wash.) 230.
Mitchell v. Colgin, 54 Pac. (Cal.) 905.
Roach v. Gooding, 81 Pac. (Ida.) 644.

By construing the word "establishment" to mean "endowment," it is then in harmony with the context of the entire Enabling Act, and is also in harmony with the theretofore unbroken policy of Congress in making grants of land to states for educational institutions.

Sec. 4660 of the Civil Code of Montana, embodies the well settled rule of construction, that

> "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate

> meaning in law, are to be construed according to such peculiar and appropriate meaning and definition."

"Establishment" when construed according to the usage of the word as defined by the dictionaries, or when construed by the context of the Enabling Act, cannot be held to mean "to construct or to erect buildings." Said section 11 is a clear and distinct limitation upon the grants of land to the state for *educational purposes.* "Establishment" by reason of the various meanings and senses in which it is used, is not a clear and distinct word, and cannot control the clear and distinct limitations contained in section 11 of the same act. The rule of construction is well settled that

> "A clear and distinct limitation in a grant is not controlled by other words less clear and distinct."

The construction placed by the Constitutional Convention of Montana upon all the grants of land in the Enabling Act for educational purposes was that they constitute an endowment for the support, maintenance and perpetuation of such institutions. Sections 2, 3 and 12 of Art. XI of the State Constitution clearly show that the Constitutional Convention never intended that the proceeds received from such grants should ever be pledged or used for the purposes of erecting school buildings. In fact such sections of the constitution expressly prohibit such use of the funds. Section 8 of the Enabling Act provides that in the formation of the State Constitution, all provisions of the Enabling Act must be complied with, and that, upon such compliance, the President must issue his proclamation admitting the state into the Union. The fact that our constitution was approved and the state admitted shows conclusively

that the construction of the Enabling Act adopted by the framers of our constitution was the construction thereof intended by Congress. Congress certainly expected and intended that the legislature would enact laws not in conflict with the state constitution which had been adopted in conformity with the provisions of the Enabling Act and approved by Congress through the President.

CONSTITUTION.

This brings us to the consideration of the provisions of the state constitution relating to the land grants for educational purposes. Is chapter 3, Laws of 1905 (set out in appendix to brief of plaintiff in error), providing for additional buildings and equipment for the State Normal College, in conflict with our constitution? Does it violate the plain provision of section 3 and section 12 of Art. XI? If it does, it is unconstitutional, regardless of the provisions of the Enabling Act. For, when the constitution was adopted and approved by Congress, it became the supreme law of this state and any act passed by the legislature relating to land grants for educational purposes must not only conform to the provisions of the Enabling Act, but also to all the provisions of the constitution relating thereto.

If the constitution throws around the funds in question additional safeguards and limitations, which are not repugnant to those contained in the Enabling Act, they control and must not be violated.

Section 2 of Article XI of the constitution defines the "public school fund of the state," and reads as follows:

"The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands; and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general governmnet for general educational purposes, or where no other special purposes is indicated in such grant," etc.

This fund consists not only of proceeds from the sale of sections 16 and 36 granted for the support of the "common schools" but also of the proceeds from the sale of lands granted for the maintenance of the various educational institutions of the state. Each of these educational institutions is a part of the public school system of the state, as well as the common or district schools. The Supreme Court of Idaho, in Roach v. Gooding, above, in construing section 4 of Article IX of their constitution, which is the same as said section 2 of Article XI of our constitution, said:

"The provisions of section 4, Article IX of our constitution, are broad enough to include all grants for educational purposes; and, after declaring of what moneys the public school fund of the state shall consist, said section provides inter alia that all other grants of land or money made to the state from the general government for educational purposes shall constitute the public school fund. The public schools of this state include the little log cabin in the remote districts, as well as the magnificent normal schools, the academy, and the State University. The university is as much a public school as is the district school. * * * And so the University of Idaho crowns the great public school system of our fair young state."

Section 3, Article XI of our constitution says:

> "Such public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested, so far as possible, in public securities within the state, including school district bonds, issued for the erection of school buildings, under the restrictions to be provided by law."

This section refers to the public school fund defined in said section 2, and provides that the same shall "remain inviolate, guaranteed by the state against loss or diversion." It further provides how such fund "shall be invested," namely, "*so far as possible in public securities within the state.*" It is apparent from the reading of this section that it was intended that such public school fund was to be invested only in public securities, and, that the public securities within the state were to be given preference. There is no conflict between said sections 2 and 3 and section 5 of said Article XI.

Said section 5 reads as follows:

> "The interest on all invested school funds of the state, and all rents accruing from the leasing of any school lands, shall be apportioned to the several school districts of the state in proportion to the number of children and youths between the ages of six and twenty-one years, residing therein respectively, but no district shall be entitled to such distributive share that does not maintain a public free school for at least three months during the year for which distribution shall be made."

The context of said section 5 clearly shows that it simply provides "for the apportionment to the several

school districts" of the rent received from the lands granted for the support of the "common schools," and of the interest received from the investment of that portion of the "public school fund," defined in said section 2, which is derived from the sale of the lands granted for the support of the "common schools" by section 10 and section 13 of the Enabling Act. But said section 5 in no way conflicts with said section 3 which expressly declares that all the public school funds shall remain inviolate, guaranteed against loss or diversion and then provides how the fund shall be invested.

The public school fund shall "remain inviolate."

"The word 'inviolate' is defined by approved lexicographers to mean 'unhurt, uninjured, unpolluted, unbroken.' 'Inviolate,' says Webster, is derived from the Latin word 'Inviolatus,' which is defined by Ainsworth to mean 'not corrupted, immaculate, unhurt, untouched.'"

4 Words and Phrases, 3759.

Flint River Steamboat Company v. Roberts, 2 Flor. 114, 48 Am. Dec. 178.

Would the taking of money out of said public school fund and using it to erect school buildings leave the fund "unhurt, uninjured, unbroken, untouched?" That it would not, is self evident,—especially when we consider that buildings must necessarily crumble and decay; that the ravages of time and the elements will within the period of a few generations totally destroy the value of such buildings. This public school fund was not intended for the exclusive use of the present generation, but as a permanent fund, the interest from which to be used for the support and maintenance of the schools and colleges, not only of the present, but of all

future generations. There can be no question but what the use of the money for the erection of public school buildings would result "in the loss or diversion of the fund." It would be inevitable. Said section 3 provides that the "fund" must be "invested." To sell the lands and invest the money in public school buildings, would not be creating a public school fund, such as was intended by the constitution. The word "fund" as here used means *money* or *public securities*. See Webster, Century and Bouvier dictionaries, also 4 Words and Phrases, 3004.

Putting money into public school buildings, which never produce any interest or income on the money expended in their erection, is not an investment of such money in the sense that the word "invest" is used in said section 3. All the public school buildings in the state are erected and maintained at the expense of the state for the purpose of giving *free education* to the children of the state.

They are not intended to be revenue producing investments. The word "invested" is defined by the Century dictionary, when used as an intransitive verb, as follows: "To make an investment; as, to invest in railway shares;" and by Webster as follows: "To make an investment; as, to invest in stocks." The Century dictionary defines "investment" as follows: "An investing of money or capital; expenditure for profit or future benefit; a placing or conversion of capital in a way intended to secure an *income* or *profit* from its investment; as, land, or the like; to make safe investment of one's property."

The meaning of the word "investment" is fully considered and discussed in the case of Savings Bank v.

Barrett, 58 Pac. (Cal.) 915. See also 4 Words and Phrases, 3755.

Furthermore, the framers of our constitution, in an abundance of caution, in order to prevent any possible misconstruction by the legislators or courts, of said sections 2 and 3 of Article XI, and to make it absolutely certain that the proceeds received from the lands granted to the State University and other institutions of learning should constitute a fund to forever remain inviolate, added section 12 to said Article XI. (Page 4 of this brief.)

It says, "The various funds shall be respectively invested." Here again the words "fund" and "invested" must be construed according to their usual and ordinary meaning as defined above in this brief.

> "The interest of said invested funds * * * shall be devoted to the maintenance and perpetuation of these respective institutions."

How could there be any "interest of said invested funds" if the money was used to erect non-revenue producing public school buildings? The use of the word "interest" in this section shows how and for what purpose it was intended that the fund should be invested. The same intention is here shown as that indicated in said section 3 which provides for the investment of the fund in public securities, which are always interest bearing investments. Furthermore, said section 12 clearly shows that the land grants for the State University and all other institutions of learning were construed by the framers of the constitution to be endowments for such institutions.

If the fund created from the sale of these lands is to forever remain inviolate; the same to be invested and only the interest and rents to be used and this use

limited to the maintenance and perpetuation of the institutions; certainly all the elements of an endowment fund are contained therein. All the safeguards for the protection of an endowment fund are there set out, in unmistakeable language. Any act of the legislature to divert this fund, or to pledge or expend it in any manner, except as an investment which will produce interest and revenue and keep the fund permanent and inviolate, is absolutely unconstitutional; and any act which authorizes the use of the interest received from the investment of such fund for any other purpose than the maintenance and perpetuation of the institution is absolutely unconstitutional.

The words "maintenance, perpetuation and support" of schools do not include the erection of buildings.

Sheldon v. Purdy, above.
Mitchell v. Colgin, above.
Roach v. Gooding, above.

Said chapter 3, Laws of 1905, which attempts to divert these funds by pledging them for the payment of bonds issued for the purpose of securing money to erect school buildings, is in direct violation of all the provisions of said section 12 and also of said section 3 of Article XI, and therefore unconstitutional, and all bonds issued in pursuance thereof are invalid.

WHY WERE LIMITATIONS IMPOSED UPON GRANTS FOR EDUCATIONAL PURPOSES BY CONGRESS IN THE ENABLING ACT, AND BY THE CONSTITUTIONAL CONVENTION IN THE CONSTITUTION?

Ever since the organization of our national government Congress has been making grants of land to new

states for the support of the public school system. At first these grants were made without any limitation upon the state as to the price for which the state might sell the land, and later Congress fixed a minimum price at the small sum of $2.50 per acre for which such lands might be sold. (See 12 Stat. at Large, p. 482, U. S. Compiled Statutes, p. 3213, 21 Stat. at Large, p. 326.) It was soon found, however, that under such land grants the states, in their desire to convert such lands into money, were disposed to sell the same at once without waiting until the lands, by reason of increased population, would increase in value; thus the lands would soon be disposed of by the state and the fund derived therefrom would be wholly insufficient as an endowment for the future support, maintenance and perpetuation of such institutions.

It was also discovered that the members of the legislatures of states receiving such land grants, urged on by the members thereof coming from counties of the state in which said educational institutions had been located, were disposed to enact laws authorizing the erection of magnificent school buildings in such localities before the population of the state actually justified or required them, and that in order to raise the money necessary to erect such expensive buildings, without imposing burdensome taxes on the sparse population of the new state, the legislatures would invariably seek to divert the money received from the sale of the lands granted to the state as an endowment for the support of the public schools and use it in the erection of such buildings.

Instead of appropriating money from the state treasury for the erection of school buildings as *actually needed* or of issuing bonds of the State of Montana, at

a low rate of interest, if necessary in order to raise the money when needed for such purposes, and thereby leave the interest and income from the endowment fund for the support of such schools, the tendency always has been to divert the endowment fund either by pledging it for the payment of bonds issued in the name of the institution, at a high rate of interest, for the purpose of raising the money to construct buildings or by paying it out direct for such purpose, and thus making it necessary to provide for the support of such school by direct taxation.

In discussing land grants and constitutional provisions similar to those of our state, the Supreme Court of Idaho, in Roach vs. Gooding, 81 Pac., p. 645, said:

> "As is clearly shown from the various acts of Congress from that of July 2, 1862, including the Act of February 18 ,1881, and the amendments thereof, and the acts of admission, admitting many states into the Union, the general attitude and policy of Congress has been to provide an endowment fund for educational purposes; the income thereof only to be used to support the institution, leaving the people of the state to furnish the buildings. Observation and experience have shown that that is a correct policy, for the history of the various states shows that the inclination of the several legislatures has been to use a great portion of such grants to erect magnificent buildings for school purposes, regardless of the necessity for such buildings. Even in our own state numerous attempts have been made by the legislature to pledge or pawn not only the interest and income of the proceeds of such lands, but the proceeds as well, in the erection, construction, and equipment of buildings."

It was for the purpose of checking this tendency of legislatures and citizens of the state to divert the perma-

nent school fund—the endowment for our public school system,—that the clear and distinct limitations upon the use of the proceeds from the land grants for educational purposes were inserted into the Enabling Act and state constitution.

Notwithstanding the fact that Congress deemed it necessary to place limitations upon the price for which lands granted to the states for educational purposes might be sold, and also upon the use of the proceeds received from such sales, and even in the Enabling Act, as is admitted by plaintiff in error, placed such limitations upon the grants made by sections 10 and 14 thereof, still plaintiff in error insists that in the same Enabling Act, Congress, by section 17, granted an aggregate of 1,900,000 acres to four states, without any limitations whatsoever.

Such a construction is absolutely inconsistent with the policy of Congress in dealing with grants of land for educational purposes, and should be sustained only upon clear, distinct and unmistakeable language, subject to no other reasonable construction.

What is the inevitable result of taking or pledging the proceeds received from such land grants for the erection of school buildings and providing furniture therefor? The money is placed in property not "permanent," that will not "forever remain inviolate." This property does not produce any interest or income to be used in the support, maintenance and perpetuation of the institution. In order to provide for the support, maintenance and perpetuation of such institutions resort must necessarily be had to direct taxation, and this direct taxation for the support of the schools must necessarily go on forever, as the proceeds received from the sales of the lands would all be diverted

and forever tied up in buildings that produce no revenue; then, sooner or later, these buildings would decay and the taxpayers of some future generation would be required, by direct taxation, to raise the money to rebuild them.

If we are not to wholly disregard the plain intention of Congress and of our Constitutional Convention to establish and maintain our public school system on a broad, permanent and self-supporting basis that would continue so long as the State of Montana exists, and are to look only to our selfish ends, and to consider only the welfare of the schools and school children of this generation, and leave future generations to provide for the education of their children as best they may, then and in that event it may be proper to continue the policy of handling the land grants for educational purposes that has been followed since our admission into the Union.

If, because our Enabling Act and constitution have been misconstrued and violated in the past we are to consider them a dead letter and wholly disregard them in the future, then it may be proper to continue our present policy of handling the public school fund. If the violation of the plain provisions of the constitution for a period of a few years has the effect of repealing and nullifying the constitution, or any part of it, then the position of plaintiff in error in this case may have some merit in it.

We submit, however, that it is the duty of the legislatures, courts and public officers of this state to see that the provisions of our constitution and Enabling Act are carried out. They were enacted not in a spirit of selfishness or of personal interest, but for the purpose of laying the broad foundation of a state government that

is supposed to endure forever. They must necessarily make provision for the future as well as for the present. The constitution is the supreme law of the land and the safeguard which protects future generations against the enactments of laws of a temporary and doubtful benefit to satisfy some popular clamor of the hour or of special legislation to satisfy the present demands of a few favored cities at the expense of the future welfare of the people of the state.

It may be claimed, however, that the money received by the new state from taxation would not be sufficient to permit of appropriations therefrom for the purpose of erecting school buildings as their necessity developed, and that the state did not have sufficient resources to issue state bonds for such purposes. The state might as well issue such bonds and levy taxes and create a sinking fund and pay the interest thereon as to issue bonds against the land grants and pledge for the payment thereof the interest intended for the support of the schools. When this interest from the investment of the proceeds received from the land grants is used to pay interest on bonds, then there must be appropriated from the state treasury just that much more for the support of the schools; so the taxpayer, in effect, pays the interest on the bonds in either case. The taxable resources of the state have to bear the burden whether the bonds are issued in the name of the state or in the name of the state institutions of learning and secured only by the land grants of such institutions.

If, by reason of the limited resources of the new state, it is claimed to be *expedient* to issue bonds against the lands granted state institutions of learning for the purpose of receiving money to erect buildings for such institutions, then, by reason of the limited resources of

each new school district in a county, it would be *expedient* to issue bonds against sections 16 and 36 and pledge the proceeds therefrom for the purpose of erecting school buildings in such new district. There is as much authority under the Enabling Act and constitution for doing the latter as there is for the former.

By following the plain mandatory provisions of our state constitution and adhering strictly to the safely guarded policy laid down by it and our Enabling Act for the management and investment of the funds received from the land grants for educational purposes, we will obtain the following results:

Section 17 of the Enabling Act grants to the state "for state normal schools, one hundred thousand acres." This land cannot be sold for less than ten dollars per acre if section 11 of the Enabling Act controls. It is all selected lands personally inspected by agents of the state. Within a few years, with the natural increase of population, all this grant of one hundred thousand acres can be sold for ten dollars or more per acre. If the proceeds from such sales are placed in a permanent fund and held inviolate there will then be the magnificent fund of at least one million dollars as an endowment for the support, maintenance and perpetuation of the State Normal College. This fund invested, as provided in the constitution, at a rate of interest of four per cent, would provide an annual income of forty thousand dollars for the support, maintenance and perpetuation of this college, and not for one year or fifty years but for as long as the State of Montana has a normal college to support and maintain. When this land is all sold and the fund thus invested, the taxpayer will be relieved from the burden of supporting this institution for all future time. Thus, after a few years to come,

instead of the legislature making an annual appropriation out of the general tax levy of twenty-nine thousand dollars for the maintenance of the normal college, as is now done, there will be an annual income from the investment of this permanent fund sufficient for such maintenance.

What is here said of the normal college applies equally to all the other educational institutions of the state.

This will be the result of following the statesmanlike policy laid down by the Enabling Act and our constitution for the development and permanent establishment of the public school system of our state. That it is the true policy, perfected from the experience of the past, is beyond question of a doubt. On the other hand, the policy pursued by the state, in violation of such provisions of the Enabling Act and constitution, must necessarily result in injury to the public school system and make the maintenance of the same a burdensome and perpetual expense upon the taxpayers for all future time.

In the case of State v. McMillan, cited above, the validity of bonds of state institutions to the amount of $741,000 was involved. In speaking of the legislative policy of handling the public school funds as distinguished from the policy laid down by the constitution and Enabling Act, the court used the following language:

> "Indeed, it is not too much to say that it was the legislative purpose, in authorizing the issuance of this class of bonds, to have the permanent educational funds invested in them. In yielding to this legislative policy, the board was clearly in error, and in doing so violated the plain provisions of the constitution, which marked the limit of their au-

thority and prescribed their duty. When the constitution speaks, its voice is supreme, and its mandates are to be obeyed by all departments and all officers of the state government.

"The members of this court are not unmindful of the embarrassment to this and other state institutions which are looking to moneys derived from these proposed loans for buildings and improvements which will follow our decision. This will be temporary, however, and is of small consequence compared with the permanent injury which would be done to the people of the state if the court, to which they have committed the preservation of their constitutional rights and the integrity of the constitution itself, should fail in the performance of their duty."

LEGISLATIVE AND EXECUTIVE.

Construction of Act.

It has been seriously and earnestly suggested and urged, and may be brought to the attention of this court in argument, that without reference to the express and solemn language of the Enabling Act and constitution, the state having benefitted by this system of bonding the land grants donated to it for educational purposes, the court might properly place the construction upon the act of the legislature which has been placed thereon by the legislative assembly, and the State Board of Land Commissioners in the past. This sort of argument begs the question and is in disregard of the solemn mandates of the Enabling Act and constitution of the State of Montana, which must govern, no matter what the effect may be, or how far reaching the results of a decision. The supreme law, the constitution, must be upheld and its mandates followed.

The true rule is stated in Cooley's Constitutional Limitations, page 83, as follows:

> "Contemporary construction * * * can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitation; it can never enlarge its natural boundary. * * * Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed tribunals to enforce it."

See also, Fairbanks v. U. S. 181 U. S. pp. 285 to 289 and 306 to 312.

IS LEGISLATURE AN AGENT?

The lands and proceeds which are sought here to be dissipated were granted to the State of Montana; the grant was not made to an officer of the State, or to an individual, or to the legislature. Note the language of section 17 of the grant: "That * * * the following grants of land are hereby made to-wit: * * * *To the State of Montana* * * * for state normal schools one hundred thousand acres." (Italics are ours.)

The State of Montana could have no existence were it not for the constitution; not only would there be no State of Montana, but there would be no legislature of such State were it not for the constitution; both the legislature and the State itself exist only by virtue of the constitution which fact was and must have been contemplated by congress in making the grant.

The last paragraph of section 17 of the Enabling Act provides, "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legis-

lature of the respective states may severally provide."

The central idea advanced by plaintiff in error, as we understand it, is that by this concluding clause of Section 17 of the Enabling Act, the congress designated and appointed the state legislature as the agent of the United States for the purpose of disposing of the land grants made and enumerated in said section 17. On page 33 of his brief, counsel states this proposition:

> "If an officer of the United States had been named, for instance, the Secretary of the Interior, no one would be found to assert that that authority granted to him by an act of Congress could be controlled by the constitution of the state."

There are two answers to this proposition. First, Congress has not done anything of the kind. Second, if Congress should attempt to make a grant of land and then provide as a condition of the grant that the same should be disposed of according to the will of an agent of the government without regard to the will of the grantee, such act would not have the effect of a grant at all, but would only be an authorization to the agent to dispose of the property named in the act for the benefit of the party named as grantee, according to the will and judgment of such agent.

Neither a state court, nor an act of Congress can coerce a legislature to action, nor control its action. A court may pronounce its laws void, but neither court nor Congress can compel it to enact a new law nor amend an old one. An action could not be maintained in any court against the state legislature, for the legislature is not an entity and has no existence except as a department of the state government under *the state constitution*, and an action against the state would be of no avail for the state is only a silent, passive recipient

according to the will of this supreme legislative agent. If then the plaintiff in error is correct, the Congress has named as an agent of the United States an agency that is neither a natural nor an artificial person and that is beyond the control of the appointing power.

A legislature can act only through the operation of laws legally enacted by it.

Section 12, Article VII of the state constitution reads, in part:

> "Every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law, and if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If then two-thirds of the members present agree to pass the same, it shall be sent, together with the objections, to the other house by which it shall likewise be reconsidered, and if approved by two-thirds of the members present in that house it shall become a law, notwithstanding the objections of the governor."

Section 40 of Article 5 of the state constitution contains the same provisions relative to every order, resolution or vote in which the concurrence of both houses may be necessary, except on the question of adjournment or relating to the salary and the transaction of the business of the two houses.

If then this legislative agent should enact a law relative to the disposition of these lands, that act would have to be submitted to the governor. (Unless this provision of the state constitution is also void as being in violation of said section 17 of the Enabling Act.) This agent would then have to submit its action for approval to one who is not named as an agent or given any author-

ity by the Enabling Act, and this law so enacted would be a state law, not a federal law. It would be executed by the state officials, not by federal officials, and rights arising respecting it would be adjudged in state courts, not in federal courts. It seems to us incredible that an act of the state legislature which so vitally affects the greatest interests of the state, which must be executed by state officials and enforced by state courts should be so superior to the state itself that it cannot be interpreted, construed or passed upon by the courts that must be appealed to adjust all rights arising thereunder. Especially is this true when a legislative act is in direct conflict with so many positive provisions of the fundamental law of the state which created both the court and the legislature.

Clearly the parties to this grant are the United States, as grantor, and the whole State of Montana as grantee—not the United States and some one department of the state government. The legislature is named in the Enabling Act solely because it is that department of the state government vested by the state constitution with the power of enacting laws for the disposition of state property, but the whole state, and not one department thereof, is the grantee.

If, instead of this concluding clause of said section 17, Congress had said "and the governors of said states shall carefully enforce all laws enacted by the respective legislatures relative to said grants" no one would contend that the governor could act arbitrarily in the matter or that the validity of his acts under the state law and constitution could not be enquired into by the state courts.

Plaintiff in error quotes from State v. Cook, 17 Mont. 329, a case relating to the State Capitol Commission.

The only question presented and determined by the court in this case was: Can the state issue bonds and pledge the land grants made by Congress for *public buildings* at the state capital for the payment thereof? In the discussion of this question, however, the court used this language:

> "We know of no constitutional limitation upon the price for which lands granted by Congress to the state may be disposed of for the erection of public buildings at the capital. The limitations created by the Enabling Act relates to lands granted for educational purposes."

In no case, however, was the question involved in the case at bar assigned, discussed or presented by counsel, or decided by the Montana court.

For the reasons and upon the authorities above cited, we respectfully submit that the decision of the Supreme Court of Montana in holding that the act of the legislative assembly of the State of Montana, approved February 2nd, 1905, to be in violation of the state constitution was correct and should be affirmed, and also that said act of the legislative assembly is in violation of the Enabling Act and that said opinion of the Supreme Court of Montana should also be affirmed upon that ground.

Respectfully submitted,

ALBERT J. GALEN,
Attorney General.
W. H. POORMAN,
E. M. HALL,
Assistant Attorneys General,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 252.

THE STATE OF MONTANA, *ex. rel.*,
CHARLES S. HAIRE,
Plaintiff in Error,

vs.

JAMES H. RICE, AS STATE TREASURER,
Defendant in Error.

IN THE

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THE STATE OF MONTANA, *ex. rel.*,
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Defendant in Error.

Sections 10 to 19, inclusive, of Montana Enabling Act.
(25 Stat. 676, 679-682.)

SEC. 10. That upon the admission of each of said States, into the Union sections numbered sixteen and thirty-six every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the sections in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States, in such man-

ner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

SEC. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SEC. 12. That upon the admission of each of said states into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said States, to be selected and located in legal subdivisions as provided in section ten of this act, shall be, and are hereby granted to said States, for the purpose of erecting public buildings at the capital of said States for legislative, executive, and judicial purposes.

SEC. 13. That five per centum of the proceeds of the sales of public lands, lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.

SEC. 14. That the lands granted to the Territories of Dakota and Montana by the Act of February eighteenth, eighteen hundred and eighty-one, entitled "An Act to

Grant Lands to Dakota, Montana, Arizona, Idaho and Wyoming, for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold for less than ten dollars per acre; but said lands may be leased in the same manner as section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty to the Territory of Dakota, for an asylum for the insane, shall, upon the admission of said State of South Dakota into the Union, become the property of said State.

SEC. 15. That so much of the lands belonging to the United States as have been acquired and set apart for the pur-

pose mentioned in "An act appropriating money for the erection of a penitentiary in the Territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is hereby, granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said State of South Dakota, for the purposes therein designated; and the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said Act of March second, eighteen hundred and eighty-one, for the Territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the State of Montana.

SEC. 16. That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

SEC. 17. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, and in lieu of any claim or demand by the said States, or either of them, under the act of September, twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the States provided for in this act, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to wit:

To the State of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools,

eighty thousand acres; for public buildings at the capital, of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all five hundred thousand acres.

To the State of North Dakota a like quantity of land as is in this section granted to the State of South Dakota and to be for like purposes, and in like proportion as far as practicable.

To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital at the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for state normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.

SEC. 18. That all mineral lands shall be exempted from the grants made by this act. But if section sixteen and thirty-six, or any subdivision or portion of any smaller subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands

in said States, in lieu thereof, for the use and the benefit of the common schools of said States.

SEC. 19. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective States entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said States the number of acres in each heretofore donated by Congress to said Territories for similar objects.

Supreme Court of the United States.

No. 252.—October Term, 1906.

State of Montana ex rel. Charles S. Haire, Plaintiff in Error, vs. James H. Rice, as State Treasurer. } In error to the Supreme Court of the State of Montana.

[January 28, 1907.]

By an act approved February 22, 1899, (25 Stat. at Large, 676,) hereafter referred to as the Enabling Act, the State of Montana was, with other States, admitted to the Union. By it grants of public lands were made by the United States to the several States admitted, of which only those made by section 17 need be stated here. By that section grants were made to the State of Montana in the following terms:

"To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; *for State Normal School, one hundred thousand acres;* for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a State reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for the purpose, one hundred and fifty thousand acres.

"*. . . And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.*"

Provision was made in the act for the selection of the granted lands from the surveyed, unreserved and unappropriated public lands of the United States, and selections were made by the State of Montana. The constitutional convention of Montana adopted an ordinance designated as Ordinance No. 1, entitled "Federal Relations," which ordained that "the State hereby accepts the several grants of land from the United States to the State of Montana, . . . upon the terms and conditions therein provided." An act of the legislative assembly of the State of Montana, approved February 2, 1905, authorized and directed the State board of land commissioners to sign and issue interest-bearing bonds to the amount of $75,000, for the principal and interest of which the State of Montana should not be liable, (section 1,) and directed the State treasurer to sell the bonds, (section 6.) Section 7 directed that—

"The moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the present State Normal School building at Dillon, Montana, and shall be paid out for such purpose by the State treasurer upon vouchers approved by the executive board of the State Normal School, and allowed and ordered paid by the State board of examiners."

The law further provided that all sums realized from the sale of, or the leasing of, or from licenses to cut trees on the lands granted for the State Normal School by section 17 of the Enabling Act should be pledged as security for the payment of the principal and interest of the bonds issued under the act, and should be set apart as a separate fund for that purpose. It was made the duty of the State treasurer to keep such money in a fund to be designated as the State Normal School fund, and to pay therefrom the principal and interest of the bonds authorized by the act.

Section 12, Article XI, of the constitution of the State of Montana is as follows:

"The funds of the State University and all other State institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the State against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

The bonds authorized by the foregoing law of the State of Montana were duly offered for sale, and purchased by the State board of land commissioners themselves as an investment of the common school fund of the State.

Charles S. Haire performed valuable services as an architect in the erection of an addition to the State Normal School, obtained vouchers approved and allowed in the manner prescribed in section 7 of the State law, and presented the vouchers to the State treasurer, who declined to pay them, whereupon the State of Montana, on his relation, brought a petition in the Supreme Court of the State of Montana against the State treasurer, praying an alternative writ of mandamus, directing the respondent to pay his claim out of the fund created by the sale of bonds aforesaid, or to show cause for the refusal. The alternative writ issued, and to it the respondent interposed a demurrer and a motion to quash. The only reason alleged by the respondent in support of his pleadings, material here, was that the act of the legislature was in violation of the constitution of Montana. The case was heard by all the judges of the Supreme Court of the State, as an original case, and it was adjudged that the alternative writ of mandamus be quashed and the proceedings dismissed,

for the reasons that the act authorizing the issue of the bonds, secured by pledge of the proceeds of the lands, was a violation of section 12, Article XI, of the State constitution, and that this section of the constitution was not in conflict with section 17 of the Enabling Act. Haire then petitioned the court for a rehearing, alleging the following reasons:

1st. Because the opinion is inconsistent and contradictory;

2d. Because the court does not give any force or effect to the requirements of section 17 of the Enabling Act, that the lands granted for a State Normal School shall be *appropriated* for the purpose for which the grant is made, and in other respects misconstrue section 17;

3d. Because the court misconstrued section 12, Article XI, of the constitution of Montana.

In the further development and specification, in the petition for rehearing of the second reason, it appears, in substance, that among the grounds relied upon to support it were the claims that section 17 of the Enabling Act had directed that the legislature and not the State should dispose of the granted lands; that the lands or their proceeds were appropriated by Congress to the establishment as well as the maintenance of the normal school; and that in acting in pursuance of the authority conferred by Congress the legislature was not restricted by the constitution of the State, which in that respect was subordinate to the authority of a law of the United States. The Supreme Court of the State took the petition for rehearing under advisement, modified slightly, but not essentially, its former opinion, which had passed adversely on the claims of the petitioner set forth in the petition for rehearing, denied the rehearing and entered final judgment for the respondent. Whereupon this writ of error was brought, assigning as errors:

"I. The said court erred in holding and deciding that the act of Congress, approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the 'Enabling Act,' does not authorize the legislative assembly of the State of Montana to appropriate or apply the proceeds derived from the sale or leasing of the lands granted to said State by section 17 of said act for State normal schools, or from the sale of the timber thereon, to the establishment of such schools.

"The court erred in holding that section 12 of Article XI of the constitution of the State, as construed by said court, is not repugnant to section 17 of said act of Congress, and is valid.

"III. The court erred in holding and deciding that section 12 of Article XI of the constitution of the State of Montana, as construed by said court, does not impair the obligation of the contract resulting from the acceptance of the grant of lands made to the State of Montana by section 17 of said act of Congress.

"IV. The court erred in holding and deciding that the proceeds derived from the sale of said lands and the timber thereon constitute a permanent

fund, no part of which can be used to establish a State Normal School, or for any other purpose, except that of investment.

"V. The court erred in holding and deciding that the interest received from the investment of the proceeds of the sale of said lands and the timber thereon, together with the rents derived from leasing said lands, can be used only for the purpose of maintaining and perpetuating a State Normal School.

"VI. The court erred in holding and deciding that the act of the legislative assembly of the State of Montana, entitled 'An act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the State Normal School College,' approved February 2, 1905, is invalid, as being in conflict with section 12 of Article XI of the constitution of the State of Montana.

"VII. The court erred in denying the application of plaintiff in error for a writ of mandate."

Mr. Justice MOODY, after making the foregoing statement, delivered the opinion of the Court.

The objection is made that no Federal question is presented by the record. It must, therefore, be determined whether the controversy turned in the State court upon any Federal question, and if so, whether it was raised and decided in that court in the manner required to give this court jurisdiction to re-examine the decision upon it. The jurisdiction to do this depends upon whether the case falls within that part of section 709 of the Revised Statutes, by which this court is given the authority upon writ of error to re-examine the final judgment or decree of the highest court of a State, "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority." Our jurisdiction in this case does not exist, unless a right claimed under a law of the United States, or an authority exercised under the United States, was specially set up in and denied by the Supreme Court of Montana. A brief discussion of the facts will determine whether these conditions of jurisdiction are present. The United States granted to the State of Montana one hundred thousand acres of the public lands for a normal school, to be held, appropriated and disposed of for such purpose, in such manner as the legislature should provide. The legislature, by a law enacted in due form, did provide that bonds should be issued, secured by the proceeds of the sale, or leasing of the lands; that the proceeds of the bonds should be used for the erection of an addition to a normal school building and paid out for that purpose on approved vouchers. In effect, though by a circuitous method, this was a devotion of the proceeds of the

sale of the land to the erection of an addition to the building. Haire presented to the State treasurer, the custodian and disbursing officer of the fund, approved vouchers for his claim for services in the erection, and payment of them was refused. The State, on relation of Haire, by proceedings which were deemed appropriate in form, sought to enforce against the State treasurer the payment of the vouchers, claiming, as appears from the opinion of the State court:

First. That the legislature had authority, under a statute of the United States, namely, section 17 of the Enabling Act, to deal with the lands as it did by the bond act;

Second. That the bond act was not in violation of the State constitution; and,

Third. That if it were in violation of that constitution, the law enacted in pursuance of an authority granted by the United States was valid and effective notwithstanding. All three of these claims were denied by the State court. The first and third are clearly claims of a "right under an authority exercised under the United States," and, therefore, raised a Federal question. *Maguire* v. *Tyler*, 1 Black, 195. But it is not enough that the claim of a Federal right arose upon the facts. It must also appear affirmatively that the right was "specially set up." No reference was made to any Federal right in the petition for the writ of mandamus, the demurrer, or the motion to quash, and the petition for a rehearing, where the Federal question was first brought forward by the plaintiff in error, so far as the record discloses, was denied by the court. It is not enough that the Federal question was first presented by a petition for a rehearing, unless that question was thereupon considered, and passed on adversely by the court. *Corkran Oil Company* v. *Arnaudet*, 199 U. S. 182.

But an examination of the opinion of the Supreme Court of the State shows clearly that that court decided two questions: first, that the bond act was in violation of section 12 of Article XI of the State constitution, which in substance provided that all funds of the State institutions of learning should be invested and only the interest upon them used for the support of those institutions; and, second, a question stated in the opinion as follows: "But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act the lands granted to the State for normal school purposes are to be held, appropriated and disposed of exclusively for normal school purposes, in such manner as the legislature of Montana may provide, and that this act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of Article XI of the constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect,"

which was decided adversely to the contentions stated. The decision of both questions, as the court determined them, was essential to the judgment rendered, and the decision of the second was a distinct denial of the Federal right claimed by the plaintiff in error. Where it clearly and unmistakably appears from the opinion of the State court under review that a Federal question was assumed by the highest court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error. *San Jose Land & Water Company* v. *San Jose Ranch Company*, 189 U. S. 177. Applying this rule to the case, there is jurisdiction to re-examine the claim of the plaintiff in error on its merits.

In support of it the plaintiff in error argues that the grant of all the land by the Enabling Act was by an ordinance accepted by the State "upon the terms and conditions therein provided;" that the legislature of the State was by the last clause of section 17 appointed as agent of the United States, with full power to dispose of the lands in any manner which it deemed fitting, provided only that the lands or their proceeds should be devoted to normal school purposes; and that, therefore, in the execution of this agency the legislature was not and could not be restrained by the provisions of the State constitution. It is vitally necessary to the conclusion reached by these arguments that the Enabling Act should be interpreted as constituting the legislature, as a body of individuals and not as a parliamentary body, the agent of the United States. But it is not susceptible of such an interpretation. It granted the lands to the State of Montana, and the title to them, when selected, vested in the grantee. In the same act the people of the Territory, about to become a State, were authorized to choose delegates to a convention charged with the duty of forming a constitution and State government. It was contemplated by Congress that the convention would create the legislature, determine its place in the State government, its relations to the other governmental agencies, its methods of procedure, and, in accordance with the universal practice of the States, limit its powers. It is not to be supposed that Congress intended that the authority conferred by section 17 of the Enabling Act upon the legislature should be exercised by the mere ascertainment of its will, perhaps when not in stated session, or by a majority of the votes of the two houses, sitting together, or without the assent of the executive, or independently of the methods and limitations upon its powers prescribed by its creator. On the contrary, the natural inference is that Congress, in designating the legislature as the agency to deal with the lands, intended such a legislature as would be established by the constitution of the State. It was to a legislature whose

powers were certain to be limited by the organic law, to a legislature as a parliamentary body, acting within its lawful powers, and by parliamentary methods, and not to the collection of individuals, who for the time being might happen to be members of that body that the authority over these lands was given by the Enabling Act. It follows, therefore, that in executing the authority entrusted to it by Congress the legislature must act in subordination to the State constitution, and we think that in so holding the Supreme Court of the State committed no error.

It is further claimed by the plaintiff in error that the Supreme Court of the State erred in holding that the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the State. Upon this question the decision of that court is conclusive, and plainly we have no power to review it.

It is further urged that the construction given by the State court to its constitution impaired the obligation of a contract, resulting from the acceptance of the granted lands by the State of Montana, and that this impairment was in violation of the Constitution of the United States. Nothing more need be said of that claim than that it appears for the first time in the petition for a writ of error from this court, and the accompanying assignment of errors. This is not sufficient to give this court jurisdiction of any Federal question, (*Corkran* v. *Arnaudet, ub. sup.*), even though another Federal question has been properly raised and brought here by the same writ of error. *Dewey* v. *Des Moines*, 173 U. S. 193.

Other questions were argued, but the view we have taken of the case renders it unnecessary to consider them.

The judgment of the Supreme Court of Montana is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.